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IN THE

Supreme Court of the United States

October Term, 1963

No. 468

CARMINE GALANTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Carmine Galante prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming petitioner's conviction and sentence for conspiring to violate the federal narcotics laws, 21 U. S. C. §§ 173, 174.

Opinions Below

In the appendix are reprinted the opinion of the Court of Appeals (Pet. App. 1-77a),* not yet reported, and an unreported opinion of the United States District Court for the Southern District of New York (Pet. App. 78-114a) denying a motion to suppress evidence on the ground that it was the fruit of wiretaps.

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* Unless the context clearly indicates otherwise, references in parentheses are distinguished as follows: to the appendix of this petition, by Pet. App.; to the stenographic minutes of the trial, by plain numerals without prefix; to stenographic minutes of the pre-trial proceedings, by P. Tr.; to petitioner's appendix as filed in the Court of Appeals, by "a" numbers without prefix; to the joint appendix as filed by all appellants in the Court of Appeals, by J. App.

Jurisdiction

The United States Court of Appeals for the Second Circuit entered its judgment on June 13, 1963, and denied rehearing on July 16, 1963. By Order dated August 1, 1963, Mr. Justice John M. Harlan extended petitioner's time to file a petition for a writ of certiorari to September 14, 1963. The jurisdiction of this Court is invoked under Title 28, § 1254(1), United States Code.

Questions Presented

1. Whether petitioner was denied effective assistance of counsel of his choice, when his counsel became disabled and the court refused to afford petitioner a reasonable adjournment to retain new counsel, for new counsel to prepare himself, or for petitioner's original counsel to recover?

2. Whether waiver of the right to counsel may be inferred from conduct that does not unequivocally betoken a deliberate waiver?

3. Whether implied waiver of the right to counsel can be inferred from "manipulation of the right" in the absence of a hearing on the question of "manipulation" in the trial court, in the absence of findings on "manipulation," and in the absence of any evidence whatever of "manipulation"?

4. Whether the petitioner was denied compulsory process for obtaining witnesses in his favor?

5. Whether petitioner was denied a fair trial by the violent misconduct of some of his codefendants, engendering prejudice and fear for their own safety among members of the jury?

6. Whether petitioner was denied a fair trial by false, wild and inflammatory accusations hurled at him by a codefendant in the course of the trial?

7. Whether petitioner was denied a fair trial by the court's refusal to permit the codefendant who had made the accusations to take the witness stand, so that he could be cross-examined concerning them?

8. Whether evidence used against petitioner was the "fruit" of illegal wiretaps?

Constitutional and Statutory Provisions Involved

Pertinent portions of the United States Constitution, Amendments V and VI, and the statutes involved, namely, 21 U. S. C. §§ 173 and 174, and 47 U. S. C. § 605, are reprinted in the Appendix. (Pet. App. 115-7a)

Statement of the Case

1. Proceedings Below

The judgment of the Court of Appeals sought to be reviewed by this petition affirmed a judgment of conviction and sentence entered in the United States District Court for the Southern District of New York after trial before MacMahon, J., and a jury. Jurisdiction is conferred on the District Court by 18 U. S. C. § 3231.

Petitioner was sentenced to 20 years imprisonment and fined $20,000 after a guilty verdict on a charge of conspiracy to violate the narcotics laws, 21 U. S. C. §§ 173, 174. Bail pending appeal was denied.

Petitioner was one of 29 persons indicted. He was not named in the substantive counts of the indictment. Of the 29, 14 stood trial. One was acquitted by the court,

and 13 were convicted by the jury. The Court of Appeals reversed the conviction of 4 defendants, among them the 3 who alone were also tried on the substantive counts.

The indictment was originally brought to trial on November 21, 1960. This first trial, before Levet, J., and a jury, ended in a mistrial on May 15, 1961, after almost six months. Its inordinate length was, in part, due to the fact that in the course of the trial it was revealed for the first time that narcotics agents had participated in wiretaps of conversations in which several defendants took part. A motion to suppress became the subject of extensive hearings which lasted for about a month. The motion was denied in an opinion which is reproduced. (Pet. App. 78-114a) At the second trial the motion was renewed (8291) on the basis of the record made on the original hearing. (P. Tr. 262) The court adopted the opinion rendered at the first trial. (8291)

At the end of the first trial several defense counsel were relieved. Some of the defendants were indigent and, despite the fact that the District Court requested and obtained the aid of the Association of the Bar of the City of New York and that of the New York County Lawyers' Association, it proved extremely difficult to find counsel for them.* (J. App. 66-7a) Finally, the Legal Aid Society undertook the

* The Court of Appeals notes, but of context, that Judge Murphy sensed on July 31, 1961 that the failure of some defendants to retain counsel was part of a plan to postpone trial. (Pet. App. 20a) Surely, Judge Murphy later admitted that his "sensing" was unreliable when he recounted the difficulties experienced in finding counsel to represent the indigent defendants despite the efforts of the court, the bar associations and the Legal Aid Society. (Opinion of Murphy, J., Jan. 3, 1962, J. App. 66-7a) The difficulty was not due to lack of defendants' desire to obtain counsel, but to the fact that prospective assigned counsel anticipated a prolonged trial.

representation of two of the indigent defendants, and the defense of the remainder was made possible through the public-spirited cooperation of some of New York's largest law firms, who volunteered the full-time services of associates. Shortly before the trial was scheduled to commence it became necessary to substitute one of the assigned counsel and to adjourn the commencement of trial for another two weeks. (P. Tr. 167-9) Assigned counsel argued that the time available to them for preparation was inadequate, but the court overruled their objections. The trial commenced as finally scheduled, on April 2nd. (2-3a) Proof introduced by the prosecution tended to show that there was a conspiracy to purchase narcotics in Canada, to import them to the United States, and to distribute them in New York.

2. Evidence Against Petitioner

Petitioner was connected with the conspiracy solely by testimony of two witnesses.* One Smith, an underworld character, told of an initial meeting in Montreal, during April or May 1957, at which he was entrusted by petitioner and others with narcotics for the purpose of transporting them to New York. (144-54) He saw petitioner twice more, both times in New York during June, 1958. The first time Smith merely observed petitioner in the company of some other defendants. (41-2a) The second time, petitioner, according to Smith, entrusted him with narcotics for further delivery in New York. (43-4a)

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* The Court of Appeals opinion contains the puzzling statement that the evidence of knowing participation in the conspiracy by petitioner is "overwhelming." (Pet. Appx 14a) Perhaps, this is to be understood as meaning that it overwhelmingly fulfills the legal requirements of a *prima facie* case. Surely, it is unlikely that the jury would have convicted on the kind of evidence which was presented against petitioner, had the jury considered only evidence.

The other witness against petitioner was Mlle. Cadieux, a Montreal brothel-keeper with a criminal record. At the first trial she told a bizarre story of being present while the petitioner, in Montreal, arranged for an American lawyer to buy narcotics there. The American lawyer stated that he could be counted on to "protect those who were pushing the heroin." (163-8a) Mlle. Cadieux refused to come from Canada to the United States for the second trial. (3874-77) Her deposition was taken in Canada. She repudiated, as completely false, her testimony at the first trial. She deposed that she had been induced to incriminate petitioner by the hope of securing better treatment for her incarcerated paramour and the promise of money from the prosecuting authorities. At the second trial both the original testimony and the repudiation by deposition, were admitted in evidence. (8720-22)

Smith had been expelled from school at the age of 15 for lying. He had been twice convicted of burglary and he admitted that he had committed perjury before the Grand Jury which had returned the indictment. He admitted numerous other instances of perjury. He frankly said that he would perjure himself whenever "he was sufficiently afraid". Although he denied that he expected any reward for testifying, he admitted that he had received $5,000 from the Canadian Government and $5,000 from the United States Government, in addition to $2,500 for expenses and witness fees and an estimated $370 a month for about two years. (J. App. 133a) The method of recruiting Smith as a witness was no less remarkable than his testimonial qualifications.

3. The Derivation of the Evidence Against Petitioner

Between the middle of November, 1959, and March, 1960, narcotics agents, in cooperation with New York City detectives, engaged in extensive wiretapping of conversa-

tions to which petitioner was a party. (Pet. App. 80a, 82a, 84a, 85-6a, 93a) As a result, petitioner and others were subjected to extensive surveillance by the City detectives and the federal agents. (Pet. App. 83-4a, 86-95a) However, neither the taps themselves nor the surveillance showed petitioner in any way to be connected with narcotics. (Pet. App. 95-8a, 113a)

Among the narcotics agents who participated in the wiretapping, and the surveillance of petitioner which followed, was narcotics agent William A. Rowan. (Pet App. 80a, 85-6a) Fresh from these activities and frustrated because they revealed no evidence of guilt, Rowan, nonetheless, set out to vindicate the suspicions first kindled by the wiretaps. In January of 1960, he approached Smith, who, in October, 1959, had testified before a Canadian Rogatory Commission. At that time he had not mentioned anything about petitioner. (110-11a) Rowan testified that he initiated the negotiations for the purchase of Smith's testimony as follows:

> "I began by explaining why I was there. I told him that I was authorized to offer him $5000 if he would testify against some defendants in a case which I was developing. I pointed out to him that he had already received monies in a previous case from the government, and that this was an entirely different matter." (405a)

Even this offer did not result immediately in the naming of petitioner as a "conspirator". Petitioner was not mentioned in Smith's first statement to Rowan (Court's Ex. A-51A for identification, Di Pietro's Ex. AO in evidence) nor in Smith's initial Grand Jury testimony in February, 1960. (109-10a; 113-4a) Some details did not emerge until much later. (135-6a)

Many witnesses testified that the Montreal meetings, which Smith claims took place in April or May, 1957, could

not have happened at the various places which Smith named. (372-3a, 479-80a) To contradict the testimony of Smith that petitioner was seen by him on two different occasions in New York during June, 1958, petitioner introduced the testimony of several witnesses who testified that they saw petitioner in Florida almost continuously from the beginning of May to July 20, 1958. (378-9a, 486-93a, 513a) Other witnesses who could have filled vital gaps were waiting to testify, at the time when petitioner was without counsel. Petitioner could not bring himself to make a decision, unaided by counsel, as to whether he should put them on and have them examined by the court. (451-5a) Confronted by this hesitation, the court "freed them from the penalties of contempt" and they left. (454-5a) The testimony of two, given at the first trial, was later read to the jury. (493-93a)

4. Petitioner's Lack of Assistance of Counsel

Mr. Nicholas P. Iannuzzi had acted as petitioner's counsel of record up to April 2, 1962, the opening day of the trial. On that day he informed the court that he was ill, and that he had made a previous application to another judge to be relieved. The other judge had ruled that he could be so relieved, but only after other counsel was ready to proceed "without any adjournment." Mr. Iannuzzi stated that petitioner had procured other counsel ready to take over, and to proceed immediately and inquired whether Miss Frances Kahn could be substituted for him. (3a) Mr. Iannuzzi had been discharged by petitioner. (5a, 395-7a). The court evidently was under the impression that the matter was discretionary and took the request under consideration. (4a)

Later, in petitioner's absence (398a), Mr. Iannuzzi presented a stipulation of substitution, pursuant to which Miss

Kahn was to be substituted as petitioner's counsel. At this point the prosecutor decided to take a hand in choosing counsel for petitioner. He stated that he had "no objection to the substitution" but suggested to the Court that Mr. Iannuzzi not be relieved. The Court accepted the "suggestion" of the prosecutor and permitted Miss Kahn merely "to join with Mr. Iannuzzi as co-counsel." The court based this ruling on the ground that Miss Kahn had informed the court of the proposed substitution only that morning, while she had been retained three weeks before. Miss Kahn stated that she had no earlier opportunity to advise the court of the substitution because she had not been sure that she could be ready in time. (4-5a) Later the same day, the court signed the stipulation of substitution (Court's Ex. 227, reprinted Pet. Br. Ct. of App. p. 69).

Thereafter, the court treated Miss Kahn as petitioner's sole counsel. An instance of this occurred on May 16. Miss Kahn was half an hour late at the opening of court. She excused her tardiness on the ground that she had been ill. In fact, she stated, she had been ill for about two weeks. (185-6a) The court called petitioner into the robing room and suggested "that he must get either associate counsel of his own selection to be here when [Miss Kahn is] not, so this trial can continue, or he must provide now for coverage by one of the other lawyers in the case . . . ." (188a) The court continued addressing Miss Kahn, as follows:

> "I do not impute to you any bad faith or anything of that nature at all. I am simply advising you and Mr. Galante that this trial is going on without delay. . . . ." (188a)

These instructions were in line with the general policy which the court had adopted not to permit the trial to be delayed by the absence of counsel, no matter how valid the reason for the absence. Instead of respecting the right

of defendants to their own counsel, the court imposed upon them the duty to "cooperate" by permitting temporary coverage by counsel to other defendants. At one point, the court threatened to enforce this "duty" by limiting, as a "first thing," the remanded defendants to cold sandwiches for lunch. (1601)

Petitioner did not act on the court's suggestion to procure stand-by counsel, in part, because Miss Kahn explained that it would be impossible to prepare other counsel at this stage and, in part, because of the financial burden which stand-by counsel would entail. (189a) The matter remained moot for approximately a month, because the indisposition from which Miss Kahn was suffering either improved or, in any event, did not prevent her from attending the trial.

On June 12, Miss Kahn failed to appear in court, since she had met with an accident during the preceding night and had been hospitalized. Evidently, the trial judge's law clerk was notified, for he called it to the attention of the assistant United States attorney in charge of the case. The latter conducted an informal investigation and reported to the court that he had spoken to physicians who had examined Miss Kahn and had learned that "there was a severe contusion." Preliminary x-ray findings were negative. Without having seen the x-rays, one of the physicians stated that "there was probably a hairline fracture." The court directed the prosecutor to prepare an order appointing a physician to examine Miss Kahn. (390-1a)

Without awaiting the result of the examination, the court, immediately, had petitioner brought before him in the robing room. The court inquired of petitioner whether he had other counsel, to which the petitioner replied that he had not. Petitioner pleaded with the court:

"Give me a chance to get counsel." (391-3a) The court granted the request to the extent of "giving [petitioner] until tomorrow to get another lawyer of [petitioner's] own choice." (394a)

Petitioner was somewhat perplexed as to what to do. He refused to allow one of the lawyers for other defendants to represent him temporarily, without consulting Miss Kahn. Since all the defendants had been remanded for the duration of the trial, he secured permission from the court to use the telephone and to speak to his family about obtaining counsel. (394a)

The court took the position that Mr. Iannuzzi "represented [petitioner] up until the day this trial commenced." (393a) The court suggested that possibly petitioner might want to "get hold of Mr. Iannuzzi or anybody else, anybody of [petitioner's] own choice." (394a) Without the slightest basis in the record, the court suggested that Mr. Iannuzzi was familiar with petitioner's case.* Petitioner denied this. (394a)

It is noteworthy that the court still acted on the assumption that Miss Kahn was petitioner's sole counsel, and that her illness entitled petitioner to an opportunity to retain counsel of his choice. Sometime later that day, at the earliest, the court purported to discover that Mr. Iannuzzi had been counsel of record all along** (395a), and

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* On the first day of the trial, Mr. Iannuzzi had informed the court that he knew "nothing about the facts in this case" and that Miss Kahn knew the facts. (6a)

** On June 14, Mr. Iannuzzi called the judicially approved stipulation of substitution to the court's attention and mentioned that he had not attended the trial—all to no avail. (438a) Only after the verdict did it become apparent that the court had forgotten signing the stipulation of substitution. When first presented with a copy, the court stated: "I have never seen it before, and that is not my signature." (526a) Only when presented with the original did the court admit signing the stipulation. (557a)

sent him a letter commanding him to be present on the next day.

Next morning, June 13, petitioner informed the court in detail about the efforts he had made to secure new counsel, that he had been unsuccessful so far, but that there was some hope that he could soon arrange for new counsel to appear. Despite petitioner's limited command of the English language, he managed to express clearly his notion of his rights in the ensuing colloquy:*

> "The Court: All the reports that the Court has received are not yet in writing, but I am advised that Miss Kahn will be confined on her back for at least a week and perhaps longer. We cannot delay this trial. Mr. Iannuzzi is your counsel of record and I am going to direct him to represent you. We will proceed to trial today.
>
> Defendant Galante: Why don't you let me go out and get myself a lawyer?
>
> The Court: He can represent you today.
>
> Defendant Galante: Are you forcing a lawyer on me?
>
> The Court: This is a lawyer you selected yourself.
>
> Defendant Galante: I did not select him, don't tell me that.
>
> The Court: He is your counsel and has never been relieved.
>
> Defendant Galante: I relieved him.
>
> The Court: I didn't.
>
> Defendant Galante: You didn't. I don't know what you are driving at, Judge. Why can't I do what I am permitted to do by laws? Why are you taking the laws into your own hands? Are you looking to get me into trouble?
>
> The Court: I am not doing that.
>
> Defendant Galante: Why don't you protect me?
>
> The Court: I am protecting you.

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* Incidentally, this colloquy represents, in full, one instance of trial conduct which the trial court found to be contemptuous. (966-68)

Defendant Galante: Why don't you let me go out and get my own lawyer?

The Court: I gave you 24 hours to get one.

Defendant Galante: I am in jail.

The Court: Mr. Iannuzzi is out there. He is a qualified criminal lawyer, a former Assistant United States Attorney.

Defendant Galante: You are not the judge of his qualifications for me. If he was, I would have retained him, I would have held him.

The Court: You did retain him.

Defendant Galante: He was just a preliminary. He is my friend. You can't force him as a lawyer on me. I object to anything you say." (395-6a)

At this point, in response to the court's letter, Mr. Iannuzzi entered the robing room. He told the court that he was not petitioner's lawyer and was not going to represent him. He was physically incapable of undertaking such a task and had been warned by his physician that to do so might be dangerous.* (397a) Mr. Iannuzzi repeated what he

* On the first day of trial, at the time Miss Kahn was substituted for Mr. Iannuzzi, he had mentioned, as one of the reasons for his need to be relieved, that he was suffering of a malignancy and that he was experiencing excruciating pain. (3a) As could have been predicted, Mr. Iannuzzi was hospitalized after attending the trial for a few days. The eagerness of the court to foist the services of Mr. Iannuzzi on petitioner contrasts sharply with other actions taken by the court on the first day of the trial.

It appeared that an attorney retained by one of the defendants had suffered a heart attack the day before. The court refused an adjournment so that the defendant thus deprived of counsel of his choice could either retain other counsel or await the recovery of his disabled attorney. (P. Tr. 618-9)

In denying the right to counsel, the court assumed the possibility of predicting the timing of heart attacks, something that seems to have eluded medical science. Consequently, according to the court, the employment of an attorney with less than perfect heart action constitutes an attempt to "escape justice." (36a; see also, 1721, 1724)

In disposing of petitioner's rights, the trial court put a hitherto unsuspected gloss on the Sixth Amendment, namely, that the choice of counsel is restricted to counsel guaranteed not to become sick or disabled in the course of a prolonged trial. (462a)

had told the court on the first day of the trial, namely, that he knew nothing about the facts of the case or petitioner's defense. Also, that since that first day thousands of pages of testimony had been taken with which he was not familiar. (6a, 400a) In answer, the court stated: "You can quickly become familiar with it." (403a) However, the court offered no adjournment for that purpose.

The court ordered Mr. Iannuzzi to "remain in [the] court room under penalty of contempt of court and do [his] level best to represent [petitioner]." Mr. Iannuzzi announced that he would remain in the court room but would refuse to participate. (339a) All this happened on Wednesday, June 13.

The record shows no further participation by Mr. Iannuzzi at the trial itself. Petitioner meanwhile continued his efforts to secure substitute counsel. (451a) On Thursday, Mr. Iannuzzi introduced to the court Mr. Kenneth O'Connor, of the office of Mr. Burton Turkus, an attorney. Mr. O'Connor informed the court that Mr. Turkus wanted to know whether the court would adjourn the case after the end of that day's (Thursday's) session until the following Monday, so that there would be at least that much time to prepare to take over petitioner's defense. The court refused to adjourn. (442-5a) Friday morning Mr. O'Connor reported to the court that he had talked with petitioner and Mr. Turkus and that an adjournment of at least a week or two was required for Mr. Turkus to enter the case. (477a)

Mr. Iannuzzi requested the court's permission to visit his physician during the lunch-hour. Permission was denied. (499-50a)

Mr. Iannuzzi entered a hospital on the morning of Monday, June 18. (460a) The court gave petitioner until one

o'clock that day to procure new counsel. Petitioner explained that that was impossible and referred to a letter which he had addressed to the court. The court directed every conceivable investigation to be made of the *bona fides* of Miss Kahn's and Mr. Iannuzzi's hospitalization. (462-3a) He also directed the preparation of body attachments in case either should be found physically able to attend court at 1 p. m. of that day (463a) The court reconvened at 1 p. m., dismissed the jury (8076), and convened again at 4:15 p. m. (8083) Although the court did not say so, it is plain from the context that the investigation did not reveal that Miss Kahn or Mr. Iannuzzi were physically able to attend court, for the body attachments remained unexecuted. (464a)

Shortly after 4:15 p. m. on Monday, June 18, the court assigned Mr. O'Connor to represent petitioner. (464-5a) Petitioner objected on the ground that Mr. O'Connor was merely a representative sent to speak with him on behalf of Mr. Turkus. Mr. O'Connor objected to the assignment on the ground that he was unfamiliar with the case and totally unprepared to proceed and that the time available to him for preparation—until 10 o'clock next morning—would be wholly inadequate. The court excused his appointment of Mr. O'Connor, as follows:

> "The Court: Mr. Galante, you, of course, have the right to counsel of your own choosing, but at the moment you have no counsel of your own choosing here." (484a)

By that time, the trial record contained over 8,000 pages, without counting pre-trial proceedings. Over 100 witnesses had testified and over 200 exhibits had been introduced. The record of the first trial contained approximately 15,000 pages more. Part of petitioner's alibi proof was still

suspended in limbo. (468a, 480-6a) To master this material, Mr. O'Connor was given less than 18 hours—if he could forego sleep that night.

Mr. O'Connor's preparation took place with the "co-operation" of the prosecutor. (474-9a) The prosecutor "went through [petitioner's] defense" with Mr. O'Connor to "save him time with respect to looking at the records." (474a)

On June 21, in a welter of confusion,* Mr. O'Connor was permitted to re-open the case, after other counsel had summed up, for the purpose of putting before the jury a stipulation which had been agreed to only that morning. (504-14a) On the same morning Mr. O'Connor summed up. (8621-41) He concluded his summation at 11:20 a.m. that day. (8641)

Mr. O'Connor had been assigned shortly after 4:15 p. m. on Monday, June 18. At most, 65 hours and 5 minutes had elapsed between the assignment of Mr. O'Connor and the conclusion of his address to the jury. At that instant of time, 79 days, 23 hours and 50 minutes had elapsed since the start of the trial. (1) In the interval, over 120 witnesses had been heard and over 275 exhibits had been received in evidence.

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* Some of petitioner's witnesses had disappeared. Whether the court had caused the disappearance is not clear. (454-5a, 460a) The court stated that he had merely released them "from the penalty of contempt of court." (469a) Cf. Amendment VI: " . . . the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . "

5. Prejudicial Events at the Trial

In characterizing the trial conduct of some of the defendants, the trial court stated that there were perpetrated "outrages unequalled in a court of justice in Anglo-Saxon history." (9051) Petitioner had no part in such "outrages." Although he was cited for contempt and sentenced to 45 days imprisonment, the incidents alleged to have constituted contempt obviously do not merit description as "outrages." (9061-79) In fact, several could hardly constitute contempts or even improprieties. Since the contempt conviction is not sought to be reviewed, this aspect of the case is neglected.

Some of the codefendants' improper conduct served no apparent purpose and, perhaps, did petitioner no serious harm. At most, it is a gauge of the excessive tension which pervaded the court room. However, other incidents had a serious impact on the capacity of the jury to render a verdict based solely on the evidence. While it seems irrelevant whether that conduct was rational or not, it is fairly obvious that several defendants were mentally disturbed.

At pre-trial, it was established that one of the defendants (Mari, later acquitted by the court) was psychotic, but capable of standing trial. (P. Tr. 418-578) As a matter of fact, with the exception of one minor incident, Mari behaved quite reasonably.

Petitioner was prejudiced primarily by the conduct of defendants Salvatore Panico and Anthony Mirra. The first sign of trouble from these quarters came on April 2, the first day of the trial. Salvatore Panico and his brother Carmine, also a defendant, after much vacillation, had retained counsel. Their retained lawyer could not be present at the initial stages of the trial. He had informed the court

that he had discussed this with the Panico brothers, and that they would be glad to accept assigned counsel. However, when the assignment was actually made, they objected to it. Finally, not content to have the objection overruled by the court, as the jury was being impanelled, Salvatore took his grievance to the array, shouting that he did not have a lawyer. (7a) Despite the relative insignificance of this incident, it was enough to prejudice at least one of the prospective jurors against all defendants and he was discharged. (9-10a)

After that first day, Salvatore remained comparatively quiet for some time, and apart from a few uncalled-for outbursts by codefendants, in or out of the hearing of the jury (e.g. 3253-54, 3494), nothing happened to prejudice seriously petitioner's rights. After one of the defendants shouted obscenities outside the robing room, and, again, after there was some slight difficulty with Mari, the court stationed additional marshals in the courtroom. (137a, 3491-4)

Serious difficulties began on May 23. On that day, Salvatore Panico suddenly entered the jury box, walked the length of it, pushing the jurors in the front row, screaming:

> "Get out of here. The Judge has got me guilty. Big John, Joe B, they are the junk pushers. We're innocent. My brother and I, we haven't got anything to do with this thing. They have me in jail already. Do you understand me? They have us in jail for nothing. They got us in jail. Twenty years they want to give me. * * * Twenty years, for nothing. Ruined for life. For what? Ruined for life. For what?" (261a)

Still screaming, he was removed from the courtroom by deputy marshals. His brother, Carmine, obviously excited by what happened, himself gave way to an outburst.

(262a) The court could not understand the cause of Salvatore's behavior. He sent Carmine to his brother in an attempt to calm the latter. (263a) After returning, Carmine reported that he had never in his life seen his brother "[that] way." (264a) Motions for a mistrial, based on this incident were denied. (266a)

The next day, as a witness identified another defendant, Salvatore shouted:

> "Let the record reflect he can see the good-looking Carlie [Di Pietro] and the other punk there—the other good-looking pushers there."

Salvatore was removed. Again a motion for mistrial was denied. (268a) A motion on behalf of one of the defendants that Salvatore be examined to determine the likelihood of further incidents thus "compounding possible prejudice" was also denied. So was a motion to examine the members of the jury on *voir dire* concerning the effect of the outbursts on them. (269-70a) Despite the indications that Salvatore was disturbed, the court announced that he would not have him examined by a psychiatrist. (271-2a)

Next morning Salvatore continued his feud with Di Pietro, by saying:

> "Di Pietro is talking about me there. He's the convicted dope-pusher. Separate me from him."

Again Salvatore was removed from the courtroom. In denying motions for mistrial the judge, in the presence of the jury, said, "'. . . it is obviously a put-up-job." (274-5a) The court excused the jury for the balance of the day and two other trial days. The interval was taken up with medical testimony regarding Salvatore's sanity. (5890-6064)

That very afternoon, May 25, Salvatore was examined by a psychiatrist appointed by the court. According to

the psychiatrist, Salvatore had developed bizarre "ideas of reference" that other prisoners were persecuting him "by singing snatches of songs," by talking about him, and in other ways. (278-81a) The psychiatrist concluded that Salvatore had "developed a paranoid state with psychosis." (279a) In his opinion, Salvatore's symptoms were not consistent with "faking." (286a) It would be fair to construe the opinion as meaning that the symptoms were also not consistent with a "put-up job." The doctor also determined that the state was "acute and temporary" and that there should be rapid and complete recovery if Salvatore were allowed a certain amount of rest and freedom from tension. (282a)

On May 29, there was further psychiatric testimony. The testimony dealt largely with Salvatore's capacity to stand trial, a question which is only remotely relevant to petitioner's contentions. Salvatore was ultimately cited for contempt, and the affirmance of his contempt conviction by a divided Court (*United States* v. *Panico*, 308 F. 2d 125) is itself the subject of a petition for certiorari to this Court. (No. 45, October Term, 1962-63) Suffice it to say here, that while Salvatore's codefendants asked that he be examined by psychiatrists for the purpose of determining whether he was likely to engage in misconduct prejudicial to his codefendants, the court never attempted to ascertain this, and never attempted by timely severance under Rule 14, F. R. Crim. P., to prevent further prejudice.

Further prejudice was not long in coming. The trial resumed May 31. As the first witness called took the stand, the following incident took place:

> "Defendant Salvatore Panico: When are you going to tell them that Galante was in the Apalachin meeting with all the top hoods in the country and

that is where they got all the orders for all these narcotics pushers?

(The defendant Salvatore Panico was removed from the courtroom by the deputy marshals.)

The Court: Ignore it, ladies and gentlemen. He will be returned to the courtroom gagged." (318a)

Petitioner moved for a mistrial, that Salvatore be again examined by psychiatrists, and that the court inform the jury that the accusation against petitioner was untrue. The motions were denied (318-21a)

At this point Salvatore's brother, Carmine Panico, defied the Court to gag him too. The Court took the dare and so ordered. (321a) The trial resumed with the two Panicos gagged and shackled (322a)

Although mute, Salvatore still managed to apprise the jury that he had important incriminating matter concerning petitioner to convey. Shortly after Salvatore had been gagged, when petitioner stood up, Salvatore, shackles clanging, rose, slammed the table and pointed to petitioner. Again, appropriate motions were made and denied. (324-7a)

This remained Salvatore's last foray. The two shackled and gagged Panicos remained in the courtroom as visible reminders of the incident. The jury was left to execute as best as it could the cautionary instructions given by the court, namely, "Ignore it." (318a).

The execution of these instructions later became even more difficult. Salvatore twice made suicide attempts, feigned or real. (6971, 7181, 7215). On the second of these attempts he slashed his wrists so that he ultimately appeared in the courtroom on June 11, bandaged, as well as gagged and shackled. (7218, 7222, 7444)

Salvatore demanded to take the stand in his own behalf, but the court denied him permission to do so. (494-503a) Thus petitioner lost the opportunity to obtain a retraction of the statement that he had attended the Apalachin meeting and there received orders for narcotics pushers, or, at least, to show by cross-examination of Salvatore that the statement was baseless.*

After Salvatore was finally subdued, defendant Mirra went out of control. He had given some slight indication of oddness at the beginning of the trial, when he twice absented himself from the courtroom. (27, 123) Except for some uncalled-for comments on testimony, he then remained quiescent until June 1. Against the advice of his lawyer (6343), he was testifying in his own defense, when he suddenly voiced his belief that one of the narcotics agents had been laughing at him "right along." The court noted that the belief ran counter to reality. (6393-94) Later that day, in denying that he knew petitioner or another defendant, he twice stated his belief from the witness stand that all his codefendants were "dope pushers" or "junk pushers." (337-8a)

At the beginning of the next trial day, June 4, Mirra was confronted by the prosecutor with an exhibit showing an earlier violation of the narcotics laws. As the prosecutor read the words, "conspiring to violate the United States narcotic laws," Mirra stood up and threw the witness chair in the direction of the prosecutor. The chair hit the top of the jury rail in front of Juror No. 4, some 15 feet away. The chair was thrown with such force as to break off a leg. (339-41a) The court directed that Mirra

* The Court of Appeals reversed Salvatore's own conviction on the ground that it was error to refuse him the right to testify in his own behalf.

be shackled, hands and feet, to the chair. Three marshals were to stand "on the side of him, in back of him and one at the bench, next to [the court]." The court charged the jury to ignore Mirra's conduct since it was irrelevant to the guilt or innocence of Mirra or any other defendant on trial. He enjoined the members of the jury to put the chair-throwing incident out of their minds and ordered that for the remainder of the trial the jury was to have lunch in a group and be escorted back and forth by United States marshals. (341a) Mirra, himself, became the third defendant to sit through the remainder of the trial shackled and gagged. (6472)

Petitioner moved for a mistrial, or that the members of the jury, at least, be examined to determine whether they had become prejudiced against the defendants. (353-4a, 348-9a) Petitioner's motions were based in part on the supposition that the incident had caused the members of the jury to fear for their personal safety. (354a) After the conclusion of the trial, a sealed minute of the trial court was ordered opened. It revealed that, unknown to defense counsel, on the day following the incident, Juror No. 10 had asked the United States marshal for protection on the way to the subway. (Judge's Min., June 5, 1962)

Reasons for Granting the Writ

1. Petitioner's right to "Assistance of Counsel" was first invaded at the opening of the trial. Mr. Iannuzzi, who had acted as petitioner's counsel of record, was unprepared and ill, and new counsel, who had been chosen by petitioner, was present, prepared and ready to try the case. If the constitutional right to counsel means counsel of one's own choice (*United States* v. *Bergamo*, 154 F. 2d 31 (C. A. 3); cf. *Chandler* v. *Fretag*, 348 U. S. 3, 9; *Powell* v. *Alabama*, 287 U. S. 45, 53), petitioner had an absolute right to discharge and replace his unfit lawyer.

Smith v. *United States*, 288 Fed. 259 (App. D. C.), cited by the Court of Appeals, and *McDonald* v. *Hudspeth*, 113 F. 2d 984 (C. A. 10), cert. denied, 311 U. S. 683, are not applicable. *Releford* v. *United States*, 288 F. 2d 298 (C. A. 9), and *Lee* v. *United States*, 235 F. 2d 219 (App. D. C.), also cited, are clearly opposed to what the Court of Appeals tolerated here.

It is difficult to conceive of any justification for the action of the court on the first day of the trial. Certainly the justification advanced—lateness of notice of the substitution, by counsel to the court—should not be deemed sufficient to permit a court to interfere with free choice of counsel.

The attempt by the trial court, prompted by the prosecutor, to keep petitioner saddled, against his will, with unprepared and ailing counsel as a stand-by, is without precedent. Whether a federal court has the power, under the circumstances of this case, thus to interfere with the untrammeled choice of counsel by an accused, seems an important question, which has not been, but should be, settled by this Court. The very fact that this question

has not heretofore arisen, betokens that the Court of Appeals has so far sanctioned a departure from the usual course of judicial proceedings by the lower court, as to call for an exercise of this Court's power of supervision. Cf. *McNabb* v. *United States*, 318 U. S. 332, 340.

Any attempt to justify the subsequent abridgements of the right to counsel must assume that, despite the Sixth Amendment, the court had the power to prevent petitioner from replacing his unfit counsel at the outset of the trial.

In disposing of a codefendant's claim, the Court of Appeals ruled that retaining counsel who is prone to illness constitutes "the kind of obstruction which the right to counsel of one's own choice must not be allowed to produce." (Pet. App. 34a) As was foreseeable and foretold, Mr. Iannuzzi ultimately became too ill to continue even his passive representation of petitioner. Hence, according to the Court of Appeals, petitioner would also have forfeited his right to counsel of his choice, had he gone to trial with his original, ailing counsel.

While the Court of Appeals assumed that Mr. Iannuzzi had not been supplanted (Pet. App. 36a)—thus leaving on petitioner the onus of Mr. Iannuzzi's lack of preparation—the action of the trial court was more ambiguous.

The lower court may have thought that Mr. Iannuzzi could be forced on petitioner merely as a stop-gap, until new counsel could be obtained. (395a). The Sixth Amendment, however, affords the right to counsel of one's choice at every stage of the proceedings. *Von Moltke* v. *Gillies*, 332 U. S. 708, 722-3; *Gadsen* v. *United States*, 223 F. 2d 627 (App. D. C.); *Snell* v. *United States*, 174 F. 2d 580, 581 (C. A. 10); *Thomas* v. *Hunter*, 153 F. 2d 834 (C. A. 10). If petitioner could not be forced to accept representation

by Mr. Iannuzzi, then petitioner was without counsel, at least at some stage, however temporary, and the trial court had no jurisdiction to proceed. *Johnson* v. *Zerbst*, 304 U. S. 458; *United States* v. *Morgan*, 222 F. 2d 673 (C. A. 2).

Petitioner, probably ignorant of his rights, to the last continued his strenuous efforts to obtain substitute counsel of his own selection and to afford the substitute a reasonable opportunity to prepare. The efforts were frustrated by the court's unwillingness to grant a continuance, no matter how short, to afford a new lawyer some small opportunity to acquaint himself with the case. Both forcing the unprepared Mr. Iannuzzi to proceed, as well as appointing Mr. O'Connor, against petitioner's wishes, without the semblance of an opportunity to prepare, were mere shams and not compliance with the constitutional mandate. *Avery* v. *Alabama*, 308 U. S. 444; *Powell* v. *Alabama*, 287 U. S. 45, 59; *United States* v. *Johnston*, 318 F. 2d 288 (C. A. 6); *Tinkle* v. *United States*, 254 F. 2d 23 (C. A. 8); *United States* v. *Koplin*, 227 F. 2d 80 (C. A. 7).

Grievous prejudice to petitioner is obvious, *e.g.*, from Mr. O'Connor's summation.* (8621-41) However, prejudice is irrelevant, for the right to counsel is "fundamental and absolute," and courts will not calculate the amount of prejudice its denial entails. *Glasser* v. *United States*, 315 U. S. 60, 76. Its fundamental and absolute nature should be reasserted here.

2. In justifying the abridgement of petitioner's right to counsel, the Court of Appeals in part relies on its answer to "similar claims" by three other defendants. Whatever the merits of those claims may have been, they were not "similar;" for those defendants—until their retained

* It illustrates, in part, the unfairness and the absurdity of letting the defense depend upon last-minute coaching by the prosecutor.

lawyers returned—were assigned counsel who was at least prepared, because he had taken part in the first trial.

More treacherous is the only pertinent attempted justification of the denial of the right to counsel:

> "The happenings below demonstrate quite forcefully why the courts have had occasion to say that the right to counsel cannot be manipulated so as to interfere with the fair administration of justice." (Pet. App. 37a)

Just how the adamant insistence on "the right to counsel" can defeat justice is not explained. The Constitution and experience alike betoken that there can be no "fair administraion of justice" if that right is abridged. This was "quite forcefully" demonstrated in the wake of this Court's landmark decision in *Gideon* v. *Wainwright*, 372 U. S. 335.*

Holding that the right to counsel must not be "manipulated," with all the sinister implications of the word, is surely not tantamount to asserting that there are circumstances under which the right may not be asserted; the Court of Appeals can only mean that petitioner, by his conduct, waived the right to counsel. Thus, the issue of what conduct warrants the inference of waiver is squarely raised and should be passed on by this Court. If the teachings of this Court that there is "every reasonable presumption" against waiver of so fundamental a privilege (*Johnson* v. *Zerbst*, 304 U. S. 458, 464) should be attenuated or abandoned, this Court should announce the new rule. *Cf. United States* v. *Johnston*, 318 F. 2d 288, 289 (C. A. 6)

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* With the help of a court-appointed lawyer, Gideon established his innocence—to the surprise of the prosecutors. New York Times, Aug. 6, 1963, p. 21, col. 2.

3. Granted, *arguendo*, that waiver may be inferred from equivocal conduct, the question arises what procedural safeguards need to be observed so that mistaken conclusions do not defeat the ends of justice. This Court anticipated the issue, to some extent, in *Johnson* v. *Zerbst*, *supra*, saying:

> "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." (304 U. S., at 465).

All that the Court of Appeals can offer, in seeming compliance, in this case, is:

> "The trial court's conclusion that manipulation was afoot is not so devoid of basis as to require reversal." (Pet. App. 37a)

Two closely related questions (here treated as one) arise: (a) how "clearly" must a determination appear upon the record, and (b) what procedural safeguards should be required before a court may determine that so important a right has been waived?

If we look at the record of the trial itself, it is devoid of any determination that there was "manipulation . . . afoot," or even any basis for such a determination. The only time the trial court expanded on the reasons why he did not afford petitioner an opportunity to obtain and prepare new counsel, was in response to a motion by Mr. O'Connor, as follows:

> "The Court: I will deny that, but in doing that I want to state my reasons: All of these defendants are incarcerated. Bail has been revoked and they have been remanded since early in April. We are coming into the extreme heat of late June and early July. The jury has been imposed upon by numerous delays.

> The Court takes judicial notice of the entire record on the prior trial before Judge Levet and the fact that it was aborted by similar delays. The Court is also mindful of the numerous delays and disruptions to this trial caused by the defendants and some of their counsel. For those reasons and a number of others which I haven't the time at this point to enumerate, I decline your application for an adjournment. (478-9a)

In the foregoing there is certainly no suggestion of, or any basis for, a finding of "manipulation." The only meaning which can be ascribed to "manipulation," in the context of this case, is that Miss Kahn and/or Mr. Iannuzzi feigned illness at petitioner's instigation. The record certainly does not suggest why lawyers, or even petitioner, should engage in such gross misconduct for the sake of a few days' or a week's adjournment, which is all that petitioner begged for.

Only after the verdict, did the trial court hint that such misconduct might have taken place. Instead of the "clear determination" envisaged by *Johnson* v. *Zerbst*, *supra*, there is, at most, casual colloquy. In measuring petitioner's sentence for contempt, the court took into consideration that "both of [his] counsel of record, first Miss Kahn and then Mr. Iannuzzi, claim to have suffered injuries or illnesses and that in neither instance were there any objective symptoms whatever found in them upon examination by doctors who examined them." * (9076)

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* So far as these observations apply to Miss Kahn, they are in error. On the first examination, objective symptoms were found. *Supra*, p. 10. In her case the complaint should have been that the objective symptoms were not sufficiently durable. But this should not have come as a surprise to the court, for the petitioner told the court, the day after her accident, that she had advised him that her condition was good (7531), and on the next day petitioner told the court that Miss Kahn would be back in a few days. Petitioner asked the court to wait for her these "few days." (436a)

Petitioner was unable to understand why he was about to be punished for the illness of his lawyer, Miss Kahn, and that of a lawyer, Mr. Iannuzzi, known to be ailing, whom the court had foisted on him. The court explained that this was fair, "because the circumstances under which it happened, plus the departure of your witnesses, make the inference overwhelming that you were in complicity with their absence from this trial." (9077-78)

It could hardly be maintained that this casual colloquy is the "clear determination" as commanded by *Johnson* v. *Zerbst*, *supra*.

In any event, a "clear determination" by the trial court in this case would have called for a hearing on the issue whether Miss Kahn was in fact ill, possibly whether Mr. Iannuzzi was in fact ill, and if either or both were found to be malingering,* whether petitioner had induced the malingering. Even if there were some evidence on these issues—there is none—it would seem that an opportunity to introduce countervailing evidence would be an indispensable prerequisite of a fair "determination."

A similar issue is adumbrated in *United States* v. *Sacher*, 182 F. 2d 416, 455, 464 (C. A. 2), aff'd *sub nom. Sacher* v. *United States*, 343 U. S. 1. The *Sacher* issue is raised by Friendly, J., dissenting, in *United States* v. *Panico*, 308 F. 2d 125, 128-30 (C. A. 2). It is tendered in Panico's petition for certiorari. (No. 45, Oct. Term, 1962-63.)

4. The error of the trial court in "freeing [some of petitioner's alibi witnesses] from the penalties of contempt," thus causing their absence, is so egregious and so unlikely to be repeated by any other court, that it would

* The record seems to indicate that there was no malingering in either case, because the body attachments remained unexecuted. *Supra*, p. 15.

not ordinarily move this Court to grant certiorari. The question is raised, because the disappearance of the alibi witnesses is linked to the questions pertaining to the right to counsel, as the trial court noted. *Supra*, pp. 8, 16, 30. If this Court should grant certiorari, but ultimately determine other questions raised, against petitioner, this error should lead to reversal in any event.

5. Two codefendants at the trial engaged in actual violence, either directed at the jury (*supra*, p. 18), or, in any event, endangering members of the jury (*supra*, p. 22). The terrifying effect of these events in the courtroom was heightened by the measures which the trial court had to adopt for the physical restraint of three defendants. No *voir dire* was conducted to ascertain whether the jury was still capable of rational determination of the issues. There is extrinsic evidence that, at least, one juror was frightened. *Supra*, p. 23.

The Court of Appeals lumps these occurrences with mere verbal outbursts and deems both governed by the rule it announced in *United States* v. *Aviles*, 274 F. 2d 179, cert. denied, 362 U. S. 974, 982. The impact on a jury of verbal outbursts and actual violence are not comparable.

The Fifth Circuit, in *Braswell* v. *United States*, 200 F. 2d 597, found violent conduct before a jury prejudicial, although the violence there did not threaten the members of the jury, themselves. The Second Circuit is clearly in conflict with the Fifth.

The Court of Appeals suggests that if its own rule were not to prevail, "it would provide an easy device for defendants to provoke mistrials." (Pet. App. 23a) The Fifth Circuit proposes two different approaches to the problem. First, defendants who do not engage in misconduct should not be prejudiced by it. Second, the defendant who stoops

to violence is adequately dealt with by contempt, at least in the absence of a showing that his conduct was deliberately staged for the purpose of inducing a mistrial.

Federal courts have the power to impose unlimited punishment for contempt. 18 U. S. C. § 401. It is of little comfort for a defendant to obtain a mistrial, when punishment for contempt may exceed the maximum which conviction might entail. The danger that misconduct might be used as a device to provoke mistrials seems remote.

This Court should pass on the question posed, to resolve the conflict between the Second Circuit and the Fifth Circuit, and, also, to determine whether a fair trial may be had before a frightened jury, or a jury of which even one member is, or may be, frightened.

6. Salvatore Panico's accusation that petitioner attended the Apalachin meeting "where they got all the orders for all these narcotics pushers," (*supra*, pp. 20-1) was not made from the witness stand.

The "Apalachin meeting," in the popular imagination, was a sinister gathering of the overlords of crime.

> "[Its] discovery touched off nationwide publicity of such nature, intensity, and persistence, that there were very few people in the United States who did not know, within a few days of November 14, about the Apalachin meeting and the suspicions of governmental authorities that it was a meeting of underworld overlords and their vassals, commonly credited with being members of the Mafia, called for various unknown but illegal purposes." *United States v. Bufalino*, 285 F. 2d 408, 415 (C. A. 2)

Had far less prejudicial matter appeared in a newspaper and actually come to the attention of members of the jury, the conviction could not stand. *Marshall v. United States*, 360 U. S. 310. Similar accusations about attendance at

Apalachin appeared in newspaper articles about a codefendant. One juror had merely glanced at one of the articles long enough to realize that it dealt with this case. Despite his assurance that the article had not prejudiced him, the judge discharged him from the jury. (Pet. App. 29a)

Since the accusation came from a codefendant whom the jury found guilty, it can be inferred that the jury credited him with inside information about the crime. It remains for this Court to settle whether so serious an accusation, dramatically hurled at petitioner, is less prejudicial than a newspaper article.

7. The Court of Appeals holds that Salvatore Panico's brother, Carmine, has no standing to complain of the lower court's error in not permitting Salvatore to testify, since Salvatore's testimony would have been merely "cumulative." Despite the statement of the Court of Appeals to the contrary, this obviously has no application to petitioner.

The petitioner had been gravely prejudiced by the accusation—precisely because it was not testimony, and was not made subject to the rules which govern testimony.

It would seem that if petitioner, *arguendo*, had to endure the irrational conduct of his codefendant, he should have at least been entitled to mitigate the damaging effect of that conduct, by cross-examination. He should not have been deprived of the opportunity to show that the accusation was baseless or, perhaps, to demonstrate to the jury that it was made by a madman. The novel rule announced in this case would relegate a defendant to the curative power of instructions, relying on that "naive assumption that . . . all practising lawyers know to be unmitigated fiction." Jackson, J., concurring in *Krulewitch* v. *United States*, 336 U. S. 440, 453.

8. The Court of Appeals adopts the conclusion of the court below that there has been no indication that informa-

tion obtained from wiretaps led to the discovery of any of the evidence which the government utilized. (Pet. App. 53a) In so ruling, the Court of Appeals seems to have repudiated its earlier ruling in *United States* v. *Coplon*, 185 F. 2d 629, 636, cert. denied, 342 U. S. 920. *Coplon* holds that once the existence of wiretapping has been established, the prosecution has the burden to prove that the tap has not led to the discovery of any of the evidence which the prosecution introduced. It would seem that that burden is not met by the mere absence of evidence to which the Court of Appeals alludes. In this connection, it is important to note that the narcotics agent who purchased the testimony of Smith destroyed his notes of the transaction for the express purpose "[t]o circumvent the Jencks decision." (First Trial 7162) *Cf. Jencks* v. *United States*, 353 U. S. 657; 18 U. S. C. § 3500.

While Smith, the main witness, had worked with the government nine months before the wiretapping began, and had introduced a narcotics agent into the conspiracy (never to petitioner) six months before, it is beyond dispute that petitioner had never been connected with the conspiracy prior to the wiretaps. The wiretaps, evidently, first connected petitioner in the minds of the government agents with some of the other defendants. This "connection" had no relation to narcotics.

The information could have been used as an interrogation tool. By pushing incidents back in time, they could be used by Smith and Mlle. Cadieux as a template with which to fashion their testimony. The ease with which that testimony could be contradicted is some indication that it was so fashioned. The government failed to carry the burden of proving that it was not. Incidentally, this is a use of wiretaps which even the innocent must fear. It would be salutory for this Court to reassert the rule announced by Learned Hand in *United States* v. *Coplon*, *supra*.

CONCLUSION

For the reasons stated above, and such additional reasons as may be advanced by other petitioners in this case, it is prayed that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit herein.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 237—October Term, 1962

(Argued January 30, 1963 Decided June 13, 1963)

Docket No. 27733

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM BENTVENA, CARLIE DI PIETRO, JOSEPH FERNANDEZ, CARMINE GALANTE, ANGELO LOICANO, FRANK MANCINO, ANTHONY MIRRA, SAMUEL MONASTERSKY, JOHN ORMENTO, CARMINE PANICO, SALVATORE PANICO, SALVATORE SCIREMAMMANO and WILLIAM STRUZZIERI,

Defendants-Appellants.

Before:

MOORE, SMITH and HAYS, *Circuit Judges.*

Appeals by thirteen appellants from judgments of conviction for violation of and a conspiracy to violate the federal narcotics law, 21 U. S. C. §§ 173, 174, after a trial by jury before Lloyd F. MacMahon, Judge, in the United States District Court for the Southern District of New York. The judgments of conviction of Bentvena, Monastersky and Struzzieri on the substantive and conspiracy counts are reversed, and the substantive counts are remanded for a new trial; the judgment of conviction of Salvatore Panico on the conspiracy count is reversed and remanded for a new trial; the convictions of all other appellants are affirmed.

JONATHAN L. ROSNER and ARTHUR I. ROSETT, Assistant United States Attorneys (Robert M. Morgenthau, United States Attorney for the Southern District of New York, William M. Tendy and Arnold N. Enker, Assistant United States Attorneys, on the brief), *for the appellee.*

JEROME LEWIS, Brooklyn, N. Y., *for appellants, Bentvena, Carmine Panico, Salvatore Panico* and *Struzzieri.*

HARRIS B. STEINBERG, New York, N. Y., *for appellant, Di Pietro.*

NATHAN KESTNBAUM, New York N. Y., *for appellant, Fernandez.*

O. JOHN ROGGE, New York, N. Y., and FRANCES KAHN, New York, N. Y., *for appellant, Galante.*

ABRAHAM GLASSER, New York, N. Y., *for appellants, Loicano* (Sylvester Cosentino, New York, N. Y., on the brief), and *Sciremammano* (George Todaro, New York, N. Y., on the brief).

CONSTANTINE N. KATSORIS, New York, N. Y., *for appellant, Mancino.*

WILLIAM R. LUNEY, New York, N. Y., *for appellant, Mirra.*

RICHARD V. GIORDANO, New York, N. Y., *for appellant, Monastersky.*

JACOB KOSSMAN, Philadelphia, Penn., and ALBERT J. KRIEGER, New York, N. Y., *for appellant, Ormento.*

Opinion of the Court of Appeals

MOORE, *Circuit Judge*:

This is an appeal by thirteen defendants from their convictions for violations of the federal narcotics laws, 21 U. S. C. §§ 173, 174. The indictment, filed on May 5, 1960, contained eight counts, and named twenty-nine defendants. Counts one through seven charged various defendants with substantive violations; count eight charged all of those named with conspiracy to violate the narcotics law. The trial from which this appeal is prosecuted was the second trial on this indictment. The first trial, before Judge Levet and a jury, ended in the declaration of a mistrial after a trial of six months.

This retrial of fourteen of the defendants began before Judge MacMahon and a jury on April 2, 1962, on counts four and five, charging sales of narcotic drugs, and count eight charging a conspiracy to import and distribute drugs.[1] On June 19, 1962, the trial court granted a motion for judgment of acquittal as to the defendant, Frank Mari, and on June 25, 1962, the jury returned a verdict of guilty as to the thirteen appellants on all counts in which they were named. Sentencing took place on July 10, 1962.[2]

Appellants, together with their co-defendants and co-conspirators, were charged with a conspiracy to import large amounts of narcotic drugs into the United States

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[1] Count four named Orlandino, Struzzieri and Monastersky; count five named Monastersky, Bentvena and Struzzieri. Orlandino pleaded guilty at the beginning of the first trial. All appellants were named in count eight.

[2] The following sentences were imposed: Bentvena—15 years on counts 5 and 8; DiPietro—20 years; Fernandez—35 years; Galante—20 years and $20,000; Lonicano—20 years; Mancino—20 years; Mirra—20 years; Monastersky—30 years on counts 4, 5 and 8; Ormento—40 years and $20,000; Carmine Panico—12 years; Salvatore Panico—20 years; Scrimaminatos—12 years; Struzzieri—12 years on counts 4, 5 and 8. The sentences imposed on multiple counts are to run concurrently. Fernandez, Monastersky, and Ormento were sentenced as multiple offenders pursuant to 26 U. S. C. § 7237(c).

from Canada, and to dilute and distribute these drugs after their importation. The principal government witness, Edward Lawton Smith, and other government witnesses, described in some detail the workings of the conspiracy and the functional division of labor within the organization. In skeleton outline the conspiracy consisted of a group of Canadians, headed by Guiseppe "Pepe" Cotroni, who handled the exportation of the drugs from Canada. Couriers brought the narcotics across the Canadian-United States border and into the New York metropolitan area. Members of the conspiracy manned centers in the New York metropolitan area where they received the drugs from the couriers and diluted and packaged them. Distributors finally disposed of the drugs through various selling outlets. Overall responsibility for the continuing operation rested in its "chief executive", the appellant Carmine Galante.

THE CONSPIRACY

The April 1957 Montreal Meeting and Narcotics Importation

In late April 1957, Smith, a Canadian with underworld connections, met the appellant Mancino in Montreal. Mancino asked Smith to make a "run" into New York with him and Smith agreed. The following day Mancino took Smith to an apartment in Montreal where they met the appellant Galante, the severed defendants Giglio and Stepanoff, and Frank Cotroni, Vic Cotroni, and a person identified only as "Angelo". Galante picked up a valise, put it on the coffee table, and opened it. Mancino examined its contents, which were clear plastic bags containing a white powder. As Smith and Mancino were leaving with the valise, they encountered the severed defendants, Guiseppe "Pepe" Cotroni and Vecchio. Smith and Mancino drove to New York to Frank's Bar & Grill

in Brooklyn where Mancino took the valise of narcotics and Smith returned to Montreal.

In late February or early March, 1958, Smith again came into New York City and drove to Frank's Bar & Grill where he met Mancino, Vecchio, and "Angelo". Mancino asked Smith if he would drive over to Manhattan and back. Smith agreed and Mancino picked up a package from Vecchio's car and directed Smith to the Vivere, a bar located on the lower east side. There Mancino left the car, rejoined Smith shortly, and they drove back to Brooklyn.

The "Route" Deliveries

During the ensuing months, Smith spoke with Mancino almost daily and there followed at weekly intervals a series of at least five "route" deliveries of narcotics throughout the Metropolitan area. On each of these occasions Smith met Mancino, Vecchio and "Angelo" at Frank's Bar & Grill in Brooklyn. Vecchio would remove a cardboard suitbox from the trunk of his car and give it to Mancino who would take it upstairs to his apartment and return in a few minutes carrying a valise. Prior to one "route" delivery, Smith accompanied Mancino to the latter's apartment with the suitbox and saw the nature of its contents, cellophane bags containing white powder. On this occasion, Smith saw Mancino wrap each of the bags in brown wrapping paper and mark them with the names of the "drops" along the route. Mancino then put the packages in a valise and an empty shoebox and he and Smith embarked on their route.

The first stop on the route was the Vivere. After the first delivery to the Vivere, Smith accompanied Mancino into the bar, where he observed Mancino put the valise on the table, take out a package and give it to DiPietro, who in turn gave it to the severed defendant Gellman.

The second stop on the run was the Squeez-Inn, a bar on East 4th Street in Manhattan. On at least three occasions, the package was given to appellant Sciremammano who carried it to the back of the bar. Another time the shoebox containing the narcotics was given to the defendant Polizanno [3] in the presence of the severed Canadian defendant Stepanoff.

The fourth stop [4] was the 1717 Club, a bar in Brooklyn operated by appellants Salvatore and Carmine Panico. There the package would be delivered to one of the brothers, both of whom would take it to the kitchen in the back of the bar.

After the stop at the 1717 Club, Smith would return with Mancino to Frank's Bar & Grill, where Smith would remain while Mancino made a delivery to "Rocco up on the Hill". Mancino later introduced the severed defendant Sancinella to Smith as "Rocco up on the Hill", and the appellant Angelo Loicano as "his partner, Puggy". In Loicano's presence, Sancinella asked Smith to make some runs from Canada for them. When Smith declined this offer, Loicano told him that he could make $100,000 to $140,000 a year in this work and that Smith should think it over.

In addition to these regular stops on the route, on three occasions Smith drove Mancino to a Manhattan hotel where packages were given to the severed defendant Indiviglio.

DiPietro and Mancino meet Cotroni in Canada

Because of a dispute over DiPietro's failure to make prompt payment in full to the Canadian group, DiPietro, late in April 1958, invited Smith to accompany him on a

3 Polizanno was severed between the first and second trials.

4 The third stop was a hotel in Coney Island. None of the persons there involved are defendants in this indictment.

trip to Canada. A day or two later, Smith, DiPietro, Mancino, "Angelo," and one Frank Randazzo drove to Canada. In Montreal, Smith arranged a meeting between Cotroni, Giglio and DiPietro. After DiPietro paid Cotroni $17,000, Giglio informed DiPietro that he was now on a "pay as you go basis." On the following evening, Mancino, Randazzo, "Angelo" and Smith drove back to New York City with a load of narcotics and Smith and Mancino made deliveries to the Vivere, the Squeez-Inn, the hotel in Coney Island, and the 1717 Club.

The Ormento Group

Between May 16 and May 21, 1958, at the Vivere, DiPietro introduced Smith to appellant Anthony Mirra. On the following evening at Mirra's request, Smith went to Johnny's Keyboard, a bar on Lexington Avenue between 56th and 57th Streets and there met Mirra, the severed defendant Petillo, and appellant Joseph Fernandez. During the next few days, the four of them spent a great deal of time together. In late May 1958, Smith and Petillo drove to the lower east side to Jay's Bar on Houston Street, where Petillo introduced Smith to three men—"Angie", "Bootsie" and "Chalutz"—the severed defendants Angelo Tuminaro, Anthony DiPasqua and Charles Gagliadatto, respectively. During the meeting, "Angie" asked Smith to make "runs" from Canada for them and when Smith declined "Angie" guaranteed that he would make $140,000 a year in this line.

A few days later, Mirra and Smith went to a restaurant, Marino's, where they met appellant John Ormento who also asked why Smith was turning down "these offers we have been making to you." In the early part of June, Smith again went to Jay's Bar with Petillo, where they met "Bootsie", "Angie" and "Chalutz." "Angie" again

pressed him to make runs from Canada and when refused asked him about the trip he had made to Canada with DiPietro, and asked whether he had brought back a "load." When Smith agreed that he had done so, "Angie" said, "Who the hell do you think that was for?" As Smith and Petillo started to leave, Petillo picked up an envelope which he said "was his end" that he received every week.

A short time later, Mirra told Smith to go to Chickie James' Stable, a midtown night club operated by Mirra. There he was joined by Mirra and Fernandez. Mirra and Fernandez went to the rear of Fernandez's car where Fernandez took out an attache case which he gave to Mirra. Smith drove Mirra to the Saxony Restaurant on East 53rd Street. As Mirra was getting out of the car, Smith asked what this was all about and Mirra opened the attache case revealing two cellophane bags containing a white powder, and said they were "making a run." When Mirra returned, he again opened up the case and showed Smith the contents, two bundles of money. They returned to the Stable where they met Fernandez and Petillo. Mirra gave the attache case to Petillo, who left the area in a taxicab.

During the second week in June, 1958, Smith and Mirra made a delivery of narcotics to Marconi's Restaurant at Ormento's behest. Sometime during the middle of June, Smith, Mirra, Petillo and Fernandez met in the basement of Chickie James' Stable and discussed the possibility of opening a new wholesale narcotics outlet. They concluded that with Smith's Canadian connection for narcotics, they could establish themselves and parted with the understanding that when all was set they would let Smith know. About a week later, Smith met with "Bootsie", "Angie", "Chalutz" and Petillo at Jay's Bar and was again urged to make trips to Canada for them.

Delivery from Galante to Ormento

Late in June 1958, Mirra, Smith and one Joseph Curtis drove to 56th Street and Sutton Place in Manhattan where Galante was standing on a corner. When they approached, Galante told Mirra that the "stuff" was in a nearby car. Mirra and Smith removed a suitcase from the rear of the car and Mirra gave it to Curtis, who put it in his car. Galante asked Mirra if he knew what to do, Mirra indicated that he did, and Galante gave Smith ten $100 bills. Mirra, Smith and Curtis then drove to the Park Sheraton Hotel, where Smith and Mirra went upstairs. In one of the rooms they met Ormento and Vinnie Bruno, not a defendant in this case. Mirra threw the suitcase on the bed and Ormento opened it, revealing a number of cellophane bags with white powder.

On the 28th or 29th of June, Mirra, Petillo and Smith were arrested by local authorities. Upon their release, Smith was criticized by Mirra for not changing hotels and when Smith remained adamant, Mirra told him to make a change or he'd wind up behind a truck, because "if Carmine [Galante] gives the order, John [Ormento] will have to carry it out, and you are going to wind up being dragged behind the truck."

Seizures of Heroin and Other Evidence

On February 14, 1959, Narcotics Agents observed Marcantonio Orlandino drive to the residence of his brother and sister-in-law, Ann and Philip Orlandino. He entered the house and came out carrying a brown paper bag and drove to his place of employment in Jamaica. Shortly after noon he drove to the Railway Express Office in Jamaica and presented a parcel for shipment to "Eula L. Brown in Chicago", giving his name as Smith. The package arrived in Chicago, and on February 18 it was

seized by agents of the Bureau of Narcotics. It contained approximately two kilograms of heroin.

Again on February 14, 1959, Narcotics Agents, together with local police, entered the residence of Ann and Philip Orlandino and found approximately seventeen pounds of heroin, over $49,000 in cash, and paraphernalia utilized in the diluting, packaging and distribution of drugs. At the same time, other agents seized two packages which contained approximately a half kilogram of heroin from the desk used by Marcantonio Orlandino at his place of employment. Further out on Long Island, at the same time, other agents entered the residence of Marcantonio Orlandino and seized, *inter alia*, an address book in which appeared the inscription: "Ang Tumanaro 95-24 148 St. Ca 6-7518 Jamaica OL. 7-5476".

In April 1959 other law enforcement officers were closing in on the center at the Vivere Lounge operated by DiPietro and Gellman. On April 27, Narcotics Agents followed Gellman to 19th Street and Second Avenue where he met DiPietro in a luncheonette. While there an agent overheard their conversation concerning an imminent sale of narcotics. DiPietro instructed Gellman to meet him "in front of the plant in exactly ten minutes." The agent followed Gellman to 226 East 18th Street where Gellman entered the building. When he came out he was carrying a brown paper bag which he gave to DiPietro, who was waiting in front of the building. They parted and DiPietro entered a car which was parked across the street from the luncheonette, and drove away. They met again in a short time later and DiPietro was seen to hand Gellman some money.

On April 30 Gellman again entered the "plant" and emerged carrying a brown paper bag. He was apprehended by federal and state officers. The bag he was carrying contained a quantity of heroin. A search of

the apartment at 226 East 18th Street, which was used as the plant, uncovered a suitcase containing a quantity of heroin, packaging paraphernalia, and some empty plastic bags with traces of heroin.

Agent Biase and Smith as "Importers" and "Retailers"

In the middle of April 1959 Smith started to cooperate with the Bureau of Narcotics and, shortly thereafter, he introduced an undercover agent of the Bureau, Patrick Biase, to Mancino in an attempt to infiltrate the conspiracy. The Agent and Mancino discussed the possibility of Smith's and the Agent's opening a new wholesale outlet for narcotics, securing narcotics from the Cotroni organization in Canada. On April 27 Biase and Smith met Mancino and were told by Mancino that he had not yet gotten the "connection" they sought to take care of supplying them with drugs during a shortage between Canadian trips but said that he would see "Rocco" (Sancinella) about it. They parted with the understanding that Smith and the Agent would contact him upon their return from Canada.

Smith and Biase went to Canada and, on April 29, met "Pepe" Cotroni and the severed defendant Rene Robert. Smith told them that he and Biase were going to open a new wholesale outlet and wanted their aid. Cotroni gave them detailed instructions on the methods used to smuggle the narcotics across the Canadian-United States border. He also asked Smith how "Angie" and "Bootsie" were. He told Smith that the narcotics seized from the Orlandino belonged to "Bootsie" and "Angelo".

On May 21 Biase and Smith returned to Montreal and were reminded by Cotroni that it was his "stuff" that had been seized—"the ten kilos in Hicksville from Orlandino." He told them that "Angie" and "Bootsie" still owed him

a substantial amount of money for the narcotics seized from Orlandino, but that he was not concerned since he could trust them. They remained in Montreal and on May 25 Cotroni told Biase and Smith that he had gotten a phone call from the people in New York and that "Angie" and "Bootsie" were not anxious for new competition. They agreed to avoid this problem by telling Mancino that they had a new connection for drugs in Florida. After arranging to communicate with Cotroni by telephone, Smith and Biase returned to New York where they met Mancino and, according to their plan, with Cotroni, told him they were going to get the narcotics from a Florida connection.

On June 3, 1959, Biase and Smith returned to Montreal and met Cotroni and Robert. Biase gave Cotroni $13,800 for narcotics. Cotroni gave the money to Robert, who left the motel room, returning a short while later with two kilograms of heroin. Biase and Smith turned the narcotics over to agents of the Bureau of Narcotics and the Royal Canadian Mounted Police.

After several telephone calls from Cotroni, Smith and Biase returned to Montreal on June 17. Once again Cotroni and Robert met them at their motel and Biase gave $14,000 to Cotroni who promised delivery of the drugs later that evening. In the early hours of June 18, while Cotroni, Biase and Smith were in the motel room, Robert entered carrying a cardboard box and a brown zipper bag which Biase had furnished. They contained approximately four kilograms of heroin. Cotroni opened the cardboard box and took out one of the plastic bags containing heroin, and indicated to Biase and Smith a point on the bag which had been punctured and then sealed with scotch tape. He told how this mark was made by him in his particular testing procedure and that it was a trademark, attesting that Cotroni himself had tested the narcotics and had found them

to meet his high standards of purity. Cotroni said, "when you see that 'X' on the tape there, you'll know that the stuff belongs to me." After separating, Biase and Smith again turned the narcotics over to agents of the Bureau of Narcotics and the Royal Canadian Mounted Police.

A week later on June 24 Cotroni came to New York City with Robert and met Smith at the Edison Hotel. Smith introduced another undercover agent, Frank Dolce, as the "money man" of their business. After the meeting, Dolce and Smith drove Cotroni to the Vivere to find DiPietro. He was not there and Cotroni asked them to drop him at Mancino's residence in Brooklyn. The next day Smith and Dolce again met Cotroni and Dolce paid him part of some money due him for narcotics. Cotroni later told Smith that he wanted him "to bring back 12 kilos for Boots and Angie." On June 30 in Montreal Robert again advised Smith that Cotroni intended to utilize him to bring drugs back to New York City for the people there. On July 7, Biase and Smith met Cotroni and Robert to arrange for a purchase. While driving around Montreal, Cotroni told them that he had six kilograms for them, and, if everything was all right, they would also take another fifteen kilograms to New York for Tuminaro and DiPasqua. Thereafter, difficulties in consummating the transaction arose and officers of the Royal Canadian Mounted Police placed Cotroni and Robert under arrest.

Sometime during July or August, 1959, shortly after Cotroni's arrest, Mirra and Indiviglio, accompanied by another man, arrived at the Montreal residence of Suzanne Cadieux, Rene Robert's mistress. They sought the "cache" of drugs Cotroni had at the time he was arrested. After threatening Mlle. Cadieux to no avail, they departed without finding the narcotics.

Sufficiency of Proof as to the Conspiracy

There was abundant evidence that all appellants, except Bentvena, Monastersky and Struzzieri, were part of a conspiracy to import and deliver narcotic drugs. The evidence of knowing participation in the conspiracy by Galante, Mancino, DiPietro and Mirra is overwhelming. The testimony of Smith not only placed Galante in the midst of the group importing the drugs but also shows him with physical possession of narcotics and direct knowledge and supervision of the importation. Smith's and Agent Biase's testimony establishes Mancino as a courier for the organization who smuggled the drugs into the United States and, with Smith, distributed the drugs on periodic "route" deliveries to wholesale centers in the New York metropolitan area. DiPietro was described as the head of the center that operated from the Vivere. There was extensive testimony relating to DiPietro's trip to Montreal and the settlement of his financial difficulties with Cotroni. Smith's testimony concerning DiPietro was corroborated by substantial independent evidence. It was DiPietro who introduced Smith to Mirra. Mirra was a member of the group operating under Ormento in the east midtown area and was responsible for the physical handling of the narcotics for this group. Smith's testimony showed Mirra delivering narcotics from Galante to Ormento whom Mirra described as his "boss." Smith accompanied Mirra on a number of narcotics deliveries. Mirra's position in the organization was corroborated by the testimony of Cadieux.

Ormento contends that he was involved in "but two isolated transactions" with "no evidence of any narcotics or indeed of any possession of narcotics." However, on the occasion of the delivery of narcotics by Mirra to Ormento at the Park Sheraton Hotel, Mirra threw the suitcase on the bed and Ormento opened it, revealing a number of

cellophane bags containing white powder. Galante had previously characterized the contents of the suitcase as "stuff". That the substance involved in this transaction was narcotics may, of course, be proved by circumstantial evidence. The evidence establishing the nature of the contents of the packages here involved was in all respects similar to that approved by this court in *United States* v. *Agueci*, 310 F. 2d 817 (2d Cir. 1962). See, also, *United States* v. *Morello*, 250 F. 2d 631 (2d Cir. 1957); *Toliver* v. *United States*, 224 F. 2d 742 (9th Cir. 1955). Ormento is in no position to invoke the isolated transaction rule. Aside from the evidence of Ormento's direct participation in this and the other narcotics transaction referred to previously, his statements to Smith concerning the latter's refusal to accept the several offers made to him clearly support an inference of knowledge of the existence of a vast organization dealing in Canadian narcotics.

Fernandez and Loicano similarly argue that the evidence against them is insufficient to establish knowing participation in a vast conspiracy and, at best, shows an isolated transaction. The isolated transaction rule

> "is not an arbitrary rule which is to be applied rigidly and without reason. It has been utilized to exonerate a defendant only when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge might be inferred." *United States* v. *Agueci*, *supra*, at 836.

The evidence against Fernandez consisted first of his taking an attache case from his car and giving it to Mirra who delivered it to the Saxony Restaurant. This attache case contained two cellophane bags filled with white powder.

Smith also testified that Fernandez had summoned Mirra and Petillo to a meeting called by Galante at Johnny's Keyboard. Finally, Smith testified that Fernandez took part in a discussion with Mirra, Petillo, and Smith concerning the importation and distribution of Canadian narcotics. At this meeting, Smith was asked if he had a strong connection with "Pepe" Cotroni and if he could get narcotics from him. When Smith replied affirmatively, Petillo indicated that the other three could get the money that was needed and that they could open a new wholesale narcotics outlet.

A single act may be enough to draw a defendant within the ambit of a conspiracy. *United States* v. *Aviles*, 274 F. 2d 179 (2d Cir. 1959), cert. denied, 362 U. S. 974 (1960); *United States* v. *Carminati*, 247 F. 2d 640 (2d Cir.), cert. denied, 355 U. S. 883 (1957). Since, however, the crime of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent or the government must submit independent evidence that the defendant knew of the conspiracy and associated himself with it. *United States* v. *Aviles*, *supra*; *United States* v. *Reina*, 242 F. 2d 302 (2d Cir.), cert. denied, 354 U. S. 913 (1957); *United States* v. *Koch*, 113 F. 2d 982 (2d Cir. 1940). We find here, as we did in *United States* v. *Aaneck*, *supra*, that there was independent evidence from which Fernandez' knowledge of, and desire to participate in, the overall conspiracy may be inferred. The conference at which the opening of a new wholesale outlet being supplied from Canada was discussed demonstrates Fernandez' knowledge of the existing conspiracy and his desire to participate in a new phase of that conspiracy. Appellant's contention that this discussion related to the formation of a new conspiracy and not a new participation in the old is not well founded. A conspiracy, once established, is presumed to continue until

the contrary is demonstrated, *United States* v. *Stromberg*, 268 F. 2d 256 (2d Cir.), cert. denied, 361 U. S. 863 (1955), and cases cited therein. Further, a conspiracy of this kind is, by its very nature, constantly expanding. The outlet contemplated at this meeting would have become just one more "drop" in the scheme of distribution. In any event, the contemplated formation of a new outlet presupposes the existence of old ones and is sufficiently probative of Fernandez's knowledge of the overall conspiracy to warrant a conviction for conspiracy. As we said in *United States* v. *Arilles*, *supra*, at 190:

> "From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it."

Loicano was introduced to Smith as a "partner" of "Rocco, up on the hill" (Sancinella) in Sancinella's presence. At this meeting at a bar in Brooklyn, Sancinella asked Smith if he would be willing to "make some runs back and forth to Canada for him and his partner Puggy (Loicano)." When Smith declined the offer, it was Loicano who suggested that he could make $100,000 to $140,000 a year as a courier and told Smith to think it over. Smith testified that a number of deliveries were made to Sancinella. Loicano contends that the conversation with Smith was not in furtherance of the conspiracy charged but was an attempt to form a new conspiracy. We disagree. Sancinella and Loicano were engaged in an effort to recruit Smith as a courier to carry narcotics from Canada. They sought to have him join the existing conspiracy as an integral part of it and not to go into competition with the old conspiracy. This is made abundantly clear by Mancino's efforts on behalf of Sancinella and Loicano to employ Smith. Mancino was the strong thread running through this entire

conspiracy. This evidence against Loicano demonstrates the requisite knowledge of the conspiracy and a transaction with its members from which it would be reasonable to infer an intent to participate in it.

Carmine and Salvatore Panico and Sciremammano also contend that there is insufficient evidence to establish their knowing participation in the conspiracy. The evidence showed that these three appellants were repeated recipients of packages on Mancino's route deliveries. While no conversations with Sciremammano illuminate his actions in repeatedly receiving packages of narcotics from Mancino and taking them to the back of the bar, this receipt of a quantity of narcotics repeated at least three times, is sufficient evidence from which a jury might reasonably conclude that the participant was aware of the existence of a larger scheme.

Like Sciremammano, the Panicos were recipients of packages of drugs at their "place of business," the 1717 Club, but unlike Sciremammano, their activities were amplified by conversations, as well as evidence of acts which clarify their knowledge of the conspiracy. Smith testified that Salvatore Panico was waiting on the sidewalk for Mancino and Smith on a number of occasions that packages of narcotics were delivered to the 1717 Club. From this evidence it might be inferred that he was there by prearrangement, with knowledge of the existence of a larger scheme in which he was participating. His actions in removing one of the packages from the valise in Smith's car on one delivery, and his admonition not to argue while they had "stuff" supports the inference. Carmine Panico participated in the receipt of the package from Mancino on each occasion and accompanied his brother into the kitchen with it. In addition, he told Smith and Mancino to do their "arguing some other place, some other time, not when you're making a run." The evidence as to his

own independent actions and statements fully supports the jury's conclusion that he knowingly participated in the overall scheme.

THE ERRORS ASSERTED

There remain for consideration those claims of error which affect all or several of the appellants.

I

A. *The Atmosphere of the Trial.*

All appellants complain that the atmosphere of the trial below rendered impossible that objective and unprejudiced hearing to which they were entitled. Specifically, they contend that the "mass conspiracy" trial, the outbursts and conduct of some defendants, the comments and actions of the trial judge, and the publicity attending the trial denied them the fundamental fairness required by due process. To appreciate fully the nature of these contentions, and to put the incidents referred to in their proper setting, we must start with the first trial and its abortive ending.

The first trial of this indictment began on November 21, 1960, after a number of delays, including a one-week postponement occasioned by the flight of the defendant Tumiaro on the eve of trial. It proceeded along its rocky road for six months over every conceivable type of obstruction and interruption. On May 15, 1961, the eve of summations, it ground to a halt after the foreman of the jury broke his back in an unexplained fall down a flight of stairs in an abandoned building in the middle of the night. No alternate jurors (four had been originally empanelled) remained and a mistrial was declared. As this court has already had occasion to consider the misadventures in the

first trial and the misconduct of the defendants which resulted in their remand and in contempt actions against some of them, they will not be fully catalogued here.[5]

At the conclusion of the first trial, the defendants were enlarged on bail and, with the court's permission, various attorneys from the first trial were discharged from their representations. The case appeared at regular monthly intervals on the trial calendar beginning June 19, 1961. On each occasion it was adjourned because a number of the defendants said that they had been unable to retain counsel notwithstanding their ability to raise substantial bail. As early as July 31, 1961, Judge Murphy sensed "that the failure to retain counsel was part of a plan to postpone trial." Despite efforts of the court and threats of contempt proceedings, it was not until March 9, 1962, that all defendants who had not been severed on the government's motion had counsel, either retained or appointed by the court. After further delays and substitutions of counsel (to be treated more fully below), the trial began on April 2.

During the polling of jurors on this opening day of trial, the first outburst by Salvatore Panico occurred. This incident was a precursor of events to come. Similar outbursts by Panico and other defendants[6] became commonplace. On one occasion Panico climbed into the jury box, walked along the inside of the rail from one end of the box to the other, pushing the jurors in the front row and screaming vilifications at them, the judge, and the other defendants. On another occasion, while the defendant Mirra was being cross-examined by the Assistant United State

5 See *United States* v. *Bonanno*, 288 F. 2d 442 (2d Cir.), aff'd *sub nom. Fernandez* v. *United States*, 81 Sup. Ct. 642, 5 L. Ed. 2d 683 (1961); *United States* v. *Galante*, 298 F. 2d 72 (2d Cir. 1962).

6 Eleven defendants were punished for contempt for their behavior during trial.

Attorney, Mirra picked up the witness chair and hurled it at the Assistant. The chair narrowly missed its target but struck the jury box and shattered. The trial judge responded to these outbursts by having the perpetrators gagged and shackled. We have described only two of the more dramatic disturbances which plagued the trial of this case for we find it neither necessary nor judicious to publicize or preserve the vile language and rebellious conduct that characterized this trial. Suffice it to say that more abhorrent conduct in a federal court and before a federal judge would be difficult to conceive.[7]

In addition to the courtroom conduct of the defendants, they engaged in a series of off-stage activities designed to delay and prolong the trial. On April 16, the defendant Sciramammano fell or tripped down two stairs at the Federal Detention Headquarters. Because of this, no testimony was taken on April 16 or on the morning of the 17th in order to permit a physician to examine Sciremammano, first in the Courthouse and then in a hospital. No objective signs of injury were found. The physician stated that in his opinion Sciremammano was feigning his "agony". Nonetheless, he refused to come to court and, when brought in a wheelchair, insisted that he was too sick to continue. No testimony was taken on the afternoon of April 18 because of the illness of the defendant Struzzieri. Mirra and Salvatore Panico, on one occasion, claimed that they had been drugged and were unable to remember what had transpired in the courtroom. In the early hours of June 7 Salvatore Panico was found by a correction officer at Detention Headquarters hanging by a belt in a cell which he occupied with his brother and another prisoner. Thus, the opening of court was delayed. Panico was unharmed and was able to continue the trial later that

7 The first trial was bedeviled by similar "illnesses" of the defendants. See *United States* v. *Bentvena*, *supra*, at 445-46.

day. A court-appointed psychiatrist noted with reference to this incident, "the ostensible attempt at self-hanging occurred under circumstances justifying suspicion" as to its genuineness. The following morning, in the shower room, while preparing to come to court, and with his brother and other prisoners in the room, Salvatore Panico made 14 widely-spaced shallow cuts on his forearm between the elbow and wrist. Panico's wounds were suthred with little loss of blood. On Monday, June 11, Monastersky's attorney informed the court that his client had fallen in the shower and had injured his arm. As with the others above-mentioned, it was asserted that Monastersky was so affected by the medication he received (an aspirin-like compound) that he was groggy and unable to follow the proceedings. Monastersky's symptoms are claimed to have persisted during the remainder of the week.

All appellants, even the perpetrators, complain of the prejudicial effect of the outbursts of the defendants. They claim that this prejudice was accentuated by the nature of the trial itself, that is, a mass conspiracy trial in which fourteen defendants were tried together. They contend that the rulings of the trial judge, in failing to declare a mistrial or sever the unruly defendants, and in ordering some of the defendants gagged and shackled and ordering an increased number of marshals to be present in the courtroom, constituted reversible error. We find no abuse of discretion in the trial judge's actions taken to preserve the security of the courtroom. If any one distinct impression is gained from a scrutiny of the record here, it is that the trial judge was justified, indeed was forced, to resort to stern measures to obtain order in his courtroom.

As to his failure to sever certain defendants and to declare a mistrial after these outbursts, we look to our recent decision in *United States* v. *Aviles*, *supra*. There, as here, a defendant burst into a tirade before the jury

accusing his co-defendants. There, as here, the trial judge promptly instructed the jury to disregard the outbursts. We said, in answer to the contention that reversal was required:

> "Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper." *Id.* at 193.

This case differs from *Aviles* only in that the outbursts of the defendants were more numerous and more offensive. But the trial judge instructed the jury to ignore the outbursts each time they occurred. This is all that he could do apart from taking steps to prevent their repetition. We have satisfied ourselves that the prosecution did not provoke the incidents. The judge did all in his power to minimize their effect, and we find no ground for reversal in the circumstances. Any other answer to these contentions would produce little less than anarchy.

Appellants also seize upon the concern expressed in our recent decision of *United States v. Agueci*, *supra*, over the problems inherent in the trial of a mass conspiracy case. Their claim, apparently, is that if this were not a multi-defendant trial, the prejudice engendered by one defendant's outburst could not accrue to the detriment of other defendants for the simple reason that they would not be there. In addition, they assert that if only two or three defendants were on trial, the chance that these disturbances would occur would be lessened.

Law enforcement and fair trial for those accused of violations is not to be limited to the pattern chosen by defendants. The administration of criminal justice in the federal courts will not be delivered into the hands of those who could gain only from its subversion. Our decision in *Aviles* is as applicable to a trial of two defendants as it is to a trial of fourteen. It may take two to conspire but it takes only one to throw a chair at a prosecutor.

Appellants claim that the trial judge should have severed each offending defendant after an outburst. Why this course of action was required we fail to see. After the incident had occurred, severance would not have protected the remaining defendants from any possible prejudice. It would simply have afforded each defendant an easy escape from the trial. Appellants insist, however, that Salvatore Panico should have been severed because even if he were competent to stand trial, he was so mentally ill during the trial that his continued presence and conduct prejudiced the rights of the other defendants to a fair trial. Their claim is that even if prejudice resulting from the outbursts could not have been erased, the judge was obligated to sever Salvatore Panico after it became apparent that he could not control himself and that other outbursts would be forthcoming.

Rule 14 of the Federal Rules of Criminal Procedure[8] provides for an exercise of discretion by the trial judge as to whether, at any point in the trial, there appears to be a possibility of sufficient prejudice to any defendant to warrant a severance. *United States v. Schaffer*, 362 U. S. 511

[8] "Rule 14. Relief from Prejudicial Joinder.

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

(1959); *Opper* v. *United States*, 348 U. S. 84 (1954); and the exercise of that discretion will be corrected only if abused. *Dowling* v. *United States*, 249 F. 2d-746 (5th Cir. 1957); *United States* v. *Haupt*, 136 F. 2d 661 (7th Cir. 1943). We have recently had before us the contention that Salvatore Panico could not be punished for contempt because he "was too mentally ill to formulate the intent to be contumacious." *United States* v. *Panico*, 308 F. 2d 125 (2d Cir. 1962). We there quoted at length from the trial judge's certificate filed pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure and concluded as follows:

> "We do not think that the conclusion of Judge MacMahon with respect to the deliberate and calculated nature of defendant's acts constituted reversible error." *Id.* at 127.

Accepting that conclusion here, little remains of appellants' claims that the trial judge abused his discretion in failing to sever Panico. The trial judge found, from his own extensive observation of Panico, and from the reports of psychiatrists that examined him, that Panico's acts were deliberate and calculated to disrupt the trial. This being so, he stands in no different position than the other unruly defendants and, as we have said, there was no abuse of discretion in refusing to grant a severance because of their actions.

All appellants also contend that the trial judge's attitude towards the defendants and their counsel, as revealed by his comments and rulings, prejudiced the jury against them. To support these claims, appellants direct our attention to isolated incidents, invariably taken out of context, and ask us to conclude therefrom that the trial judge abandoned his proper sense of impartiality and placed the weight of his position on the side of the prosecution.

The trial judge, in his attempt to bring this case to trial and to see it brought to an orderly and expeditious conclusion, was presented with a host of problems calling for the exercise of his discretion. Having the experience of the first trial before him, he had to make certain that the trial proceeded with reasonable dispatch and, at the same time, guarantee that all steps be taken to safeguard the rights of the defendants. In view of the unprecedented tactics employed to impede the continuance and resolution of this trial, we find that the actions and rulings of the trial judge were reasonable and often necessary to prevent the frustration of justice.

Appellants strenuously urge upon us two incidents in particular that are alleged to typify the trial judge's attitude. The first concerns the identification of Struzzieri by a government agent.[9] When the Agent was asked to do so by the prosecutor on direct examination, he identified Struzzieri as the one "with the gray suit, he has a black tie on." Struzzieri, in fact, had a gray suit and white tie on. When defense counsel called attention to this fact, the judge had the witness step down and touch the defendant he identified as Struzzieri. He identified the right man. Defense counsel then asked the judge to put a description of the clothing worn by Struzzieri in the record. The judge responded:

> "The Court has already indicated what happened. I will simply say that Struzzieri does not have on a black tie. He does have on a dark gray suit. I also say for the record that there was no doubt in the Court's mind who was identified. It will be for the jury to decide, however."

[9] This incident has been considered by this court once before. See *United States v. Dilliard*, 302 F. 2d 612 (2d Cir. 1962).

Appellants contend that this was an unwarranted intrusion by the trial judge into the province of the jury and that it exemplified the judge's partial attitude. The facts do not justify appellants' conclusion.

At a pretrial conference, the trial judge asked defense counsel to devise a seating arrangement for themselves and for the defendants and he informed them that he would agree to anything reasonable. Defense counsel asked to be able to shift the defendants around as they saw fit. The trial judge refused this request on the ground that it would create disorder but agreed to an arrangement whereby the defendants would sit behind their respective counsel. Some time just before the incident in question, DiPietro left the seat he ordinarily occupied and took a seat immediately to Struzzieri's left. DiPietro was dressed in a light gray suit and wore a black necktie. The shades of Struzzieri's dress were just the opposite; he wore a dark gray suit and a white tie. Up to this point in the trial, each time a witness was asked to identify a defendant, that defendant stood up, either at the direction of his counsel or without being asked, before the identification took place. The witness involved in this incident was asked to identify both Bentvena and Struzzieri. Bentvena stood up and the witness identified him; Struzzieri stood up and the witness identified him but remarked that he had a black tie on. Defense counsel, who had their backs to both DiPietro and Struzzieri, wheeled around and asserted that the witness had identified DiPietro. The trial judge concluded that the defendants had engaged in a pre-arranged attempt either to confuse the witness or mislead the jury. On the basis of the facts of record set out above, and our own detachment from the atmosphere of these proceedings, we can neither say that he was wrong in his conclusions nor that his statements made in the presence of the jury were improper.

The second incident concerns the trial judge's characterization, in the presence of the jury, of certain outbursts by defendants as "a put-up job." On the morning of May 25, 1961 shortly after the first witness of the day had assumed the stand, the following occurred:

> Defendant Salvatore Panico: "DiPietro is talking about me there. He is the convicted dope pusher. Separate me from him."
>
> Defendant DiPietro: "Stop him. I told you, Al."
>
> Mr. Krieger: "I move for a mistrial as far as DiPietro is concerned."
>
> (Deputy marshals escort Salvatore Panico from the courtroom.)
>
> * * *
>
> The Court: "Your motion for a mistrial is denied, Mr. Krieger. It is obviously a put-up job."

It should not be the function of an appellate court with all the advantages of hindsight to substitute itself for the trial judge and to declare how it might have handled each situation or to deliver lengthy admonitions to trial judges on the proprieties of conducting these difficult criminal trials and the need to avoid embroilment with defendants and defense counsel despite the kind of provocation evident here. This was but one incident in a trial that lasted almost three months. It was not, as appellants contend, an indication of the hostility of the trial judge toward the defendants and their counsel. We have described sufficiently the outrageous conduct of the defendants at this trial. We find that the trial judge, notwithstanding this harassment, maintained an impartial attitude and did all in his power to safeguard the rights of the defendants and to minimize the effects of these outbursts. After the incident

in question, as after all similar disturbances, the judge instructed the jury to ignore it. We find no ground for reversal here.

B. *Newspaper Publicity*

During the cou of the trial, certain articles appeared in the New York newspapers specifically referring to the trial and some of the defendants. These articles called attention to the reason for the declaration of a mistrial in the first trial and described some of the defendants as "delegates to the 1957 underworld convention in Apalachin," and as linked to "the Mafia." Upon being advised of the contents of these articles, the trial judge conducted a number of "*voir dires*" of the jury. No juror had read any of the articles. One juror indicated that his wife, in an effort to find out what case he was sitting on, showed him two newspaper articles. He glanced at one long enough to realize that it was about this case and then put it aside and refused to discuss it further with her. He gave every assurance that the article had not prejudiced him. The judge, nevertheless, discharged him from the jury.

After each *voir dire* and before each day's recess, with one exception, the judge cautioned the jurors against reading anything that related to this trial or to narcotics generally and to refrain from discussing the case with anyone. In addition, the trial judge had the United States Attorney write to all New York publishers requesting that they avoid publishing articles related to the case. This request was complied with until the misconduct of the defendants reached such violent and bizarre extremes that the voluntary ban was lifted by the press. Even then, only one article appeared that discussed the happenings of the trial. It is evident from the record here that the trial judge was extremely sensitive to the problems raised by adverse

newspaper publicity.[10] He took every precaution possible to prevent the publication of prejudicial articles and repeatedly admonished the jury to avoid contact with any such publicity.

"The crux of the matter is whether the statements were so prejudicial as to require the trial judge, who has large discretion in such matters, * * * to empanel a new jury." *United States* v. *Feldman*, 299 F. 2d 914, 917 (2d Cir. 1962). Here there was no showing that any juror came into contact with such matter, nor was there, of course, any showing that a juror could not serve in a fair and impartial manner. That, coupled with the affirmative action taken by the Government and the trial court's continuing efforts to secure a fair and impartial jury, clearly compel the conclusion that appellants suffered no prejudice. *United States* v. *Agueci*, *supra*; *United States* v. *Leviton*, 193 F. 2d 848 (2d Cir. 1951), cert. denied, 343 U. S. 946 (1952).

C. *Denial of Right to Counsel—Adequacy of Time to Prepare for Trial*

A number of appellants contend that they were denied the effective assistance of counsel by the trial judge's refusal to postpone commencement of the trial so that defense counsel could adequately prepare. At a pretrial conference held on March 9, 1962, the trial judge set the case for trial on March 19th. One of the assigned counsel had been appointed as recently as March 2nd. In rejecting applications for adjournment, the trial judge explained that the case had been tried once before, that they were in the advantageous position of having the Government's case set out in the record, and that the facts of the case could easily be mastered by the date set for trial. On March 16th

10 The transcripts of all hearings relating to newspaper publicity were ordered sealed by the trial judge to safeguard further the rights of the defendants.

at another pretrial conference, the trial court relieved Mancino's counsel of his assignment because of health and substituted another attorney, adjourning the trial for two weeks to enable the newly assigned counsel to prepare. The trial judge was of the opinion, in view of the assurance given by the new attorney's firm that he would be given sufficient assistance, that he could be prepared by April 2nd.

The disposition of a request for continuance rests in the discretion of the trial judge and the exercise of that discretion will not be disturbed unless a clear abuse is shown. See, *e.g.*, *Avery* v. *Alabama*, 308 U. S. 444 (1940); *Johnson* v. *United States*, 291 F. 2d 150 (8th Cir. 1961), cert. denied, 368 U. S. 880 (1961); *Torres* v. *United States*, 270 F. 2d 252 (9th Cir. 1959), cert. denied, 362 U. S. 921 (1960); *Bunn* v. *United States*, 260 F. 2d 313 (8th Cir. 1958); *Thomas* v. *United States*, 252 F. 2d 182 (9th Cir. 1958); *United States* v. *Kelley*, 186 F. 2d 598 (7th Cir.), cert. denied, 341 U. S. 954 (1951); *United States* v. *Wright*, 176 F. 2d 376 (2d Cir. 1949), cert. denied, 338 U. S. 950 (1950). The test here is whether the lack of effective assistance of counsel was such "as to shock the conscience of the Court and to make the proceedings a farce and mockery of justice." *United States* v. *Wright*, *supra*, at 379; *Avery* v. *Alabama*, *supra*, at 450. And the "time consumed in oral discussion and legal research is not the crucial test. * * * The proof of the efficiency * * * lies in the character of the resultant proceedings." *United States* v. *Wright*, *supra*, at 379.

We find no abuse of discretion here. We have already referred to the difficulties experienced in bringing this case to trial a second time. The defendants and the government had grave interests at stake in seeing that further procrastination be avoided and that the trial be commenced without delay. The trial court was authorized, indeed was required, to take whatever reasonable

steps he could to effectuate those ends. His action, in setting the case peremptorily against both sides and directing that the trial begin on April 2nd, was such a reasonable step. The contention that it was an abuse of discretion is belied by the zeal and quality of the performance rendered by defense counsel at trial and before this court.

1. *The Panicos and Loicano*

Carmine and Salvatore Panico and Angelo Loicano contend that they were deprived of adequate and effective counsel and were denied their constitutional right to be represented by counsel of their own choosing. On September 5, 1961, Albert C. Aronne, Esq., filed notices of appearance for both Panicos. Mr. Aronne was not present at the first pretrial conference held on March 9th but did appear for the second conference on March 12th. He there moved to withdraw his appearance asserting that it was never intended that he would try the case because the Panicos did not want him as trial counsel; that he was not familiar with the procedure in the federal courts and that he had not been paid. The trial court denied the motion on the ground that it came too late. In the afternoon of March 29th, three days before trial, Mr. Aronne informed the trial court that he had been ordered to trial in a state court and would be detained there for about a week. On October 23, 1961, Sylvester Cosentino, Esq., filed a notice of appearance on behalf of Loicano. In the first morning of trial, Mr. Cosentino did not appear and it was found that he was in the hospital.

Thus, on the first day of trial, there were three defendants who did not have counsel in court. In an attempt to proceed with the trial, the judge requested that other counsel cover for the missing attorneys until they returned and that the defendants agree to such coverage. Neither

request met with any success, the Panicos now deriving comfort only from Mr. Aronne's representation.

Defense counsel on this first morning were also in the process of substituting counsel for a number of defendants. When all the switches had been made, George Todaro, Esq., ended up relieved of his representation of other clients. The trial court assigned him to represent the two Panicos and Loicano until such time as their retained counsel returned or they obtained other counsel.[11] Later, the court directed the prosecution not to put in evidence directly relating to these defendants until their retained counsel returned. Accordingly, the testimony through April 11th dealt primarily with the substantive counts and did not directly involve the Panicos or Loicano. Mr. Aronne returned on April 11th and the Judge afforded him an opportunity to review the existing trial record and make any motions on behalf of the Panicos, or recall any witnesses for further cross-examination. He also offered Mr. Aronne the opportunity to make an opening address on behalf of the Panicos after the Government rested, despite their explicit waiver of an opening. Mr. Cosentino returned on April 16th and the same opportunities were made available to him. From April 11th, when testimony concerning Loicano began, to April 16th, Mr. Todaro was representing only Loicano. These three appellants claim that the trial judge, by proceeding with the trial while their retained counsel were absent and by appointing Mr. Todaro to represent all three on an interim basis, deprived them of the effective assistance of counsel and the right to counsel of their own choice.

A defendant in a federal court is, of course, entitled under the Sixth Amendment to the assistance of counsel

[11] This appointment was challenged in a mandamus proceeding before this court. The writ was denied *Loicano v. MacMahon*, 2d Cir. Docket No. 27487, April 4, 1962.

for his defense, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and where he is able to obtain counsel for himself he must be given a reasonable time and a fair opportunity to secure counsel of his own choosing. *Crooker* v. *Chandler*, 357 U. S. 433 (1958); *Chandler* v. *Fretag*, 348 U. S. 3 (1954). An accused's right to select his own counsel, however, cannot be insisted upon or manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. *United States* v. *Terranova*, 309 F. 2d 365 (2d Cir. 1962); *United States* v. *Arlen*, 252 F. 2d 491 (2d Cir. 1958); *United States* v. *Paccione*, 224 F. 2d 801 (2d Cir.), cert. denied, 350 U. S. 896 (1955); *United States* v. *Mitchell*, 138 F. 2d 831 (2d Cir. 1943), cert. denied, 321 U. S. 794 (1944). Thus, if a defendant does not give the court adequate notice that his retained counsel will be unable to attend the trial, the trial court may, in the exercise of its sound discretion, do what is reasonably necessary to meet the situation. And where the inability of retained counsel to serve gives promise of unreasonable delay or inconvenience in completing the trial, the court may require the defendant to secure other counsel. *Releford* v. *United States*, 288 F. 2d 298 (9th Cir. 1961); *Lee* v. *United States*, 235 F. 2d 219 (D. C. Cir. 1956); *Smith* v. *United States*, 288 Fed. 259 (D. C. Cir. 1923).

We find that the judge acted reasonably in the circumstances. The delay that would have been caused by acceding to the Panicos' vacillating desire to have Mr. Arome represent them at trial, and Loicano's insistence on Mr. Cosentino's services despite the knowledge of his heart condition and the fact that this condition had caused repeated motions for adjournments in the first trial is precisely the kind of obstruction which the right to counsel of one's own choice must not be allowed to produce. These

appellants refused to obtain other counsel and rejected the court's attempt to obtain coverage from the other defense counsel. They demanded that the court close its doors until they and their counsel were ready for trial. One with a bent for statistics would find, no doubt, that if this trial were continued on every occasion that one or more of the defendants or their counsel so requested the trial would still be in progress. This disruption of the court's business and tampering with the rights of the other defendants and the government cannot be tolerated. See *United States* v. *Mitchell, supra.* The steps taken by the court during retained counsel's absence and the opportunities made available to them on their return fully protected the rights of these appellants.

These three appellants, relying on *Glasser* v. *United States*, 315 U. S. 60 (1942), also contend that the appointment of Mr. Todaro to represent all three denied them the effective assistance of counsel. This claim is baseless. As the Supreme Court recognized in *Glasser*, and as the circuits have recognized since that case was decided, an appellant must show some conflict of interest between himself and the other defendants represented by his attorney before he can claim successfully that the joint representation deprived him of his right to counsel. See *Wynn* v. *United States*, 275 F. 2d 648 (D. C. Cir. 1960); *Lebron* v. *United States*, 229 F. 2d 16 (D. C. Cir. 1955), cert. denied, 351 U. S. 974 (1956); *Lott* v. *United States*, 218 F. 2d 675 (5th Cir. 1955); *Sanders* v. *United States*, 183 F. 2d 748 (4th Cir. 1950), cert. denied, 340 U. S. 921 (1951); *United States* v. *Dennis*, 183 F. 2d 201 (2d Cir. 1950), aff'd 341 U. S. 494, rehearing denied, 342 U. S. 842 (1951); *Kennedy* v. *Sanford*, 166 F. 2d 568 (5th Cir.), cert. denied, 333 U. S. 864 (1948); *Setser* v. *Welch*, 159 F. 2d 703 (4th Cir.), cert. denied, 331 U. S. 840 (1947); *Farris* v. *Hunter*, 144 F. 2d 63 (10th Cir. 1944). As noted above, Mr. Todaro repre-

sented these three appellants during a part of the trial in which no significant evidence was introduced against any of them. In compliance with the court's instructions, the prosecution put in evidence relating only to the substantive counts in which none of them were named. No conflict of interest is pointed to by appellants and none is apparent to us.

2. *Galante*

On September 5, 1961, Nicholas P. Iannuzzi, Esq., filed a notice of appearance for Galante. On the first afternoon of trial he sought to withdraw in favor of Miss Frances Kahn, who told the court that she had been retained some three weeks earlier but had not had the opportunity to so advise the court. The trial judge permitted Miss Kahn to appear as co-counsel and conduct the defense but explicitly refused to relieve Mr. Iannuzzi of his representation. On June 12, Miss Kahn suffered one of the injuries that plagued defense counsel during the trial of the case. No proceedings were held on this day and the court summoned Mr. Iannuzzi to appear. Galante was afforded an opportunity to obtain other counsel if he so desired. During the remainder of the week, Galante refused Mr. Iannuzzi's assistance. On June 18th Mr. Iannuzzi turned himself into the hospital. Doctors appointed by the court to determine the physical conditions of Miss Kahn and Mr. Iannuzzi could find no objective symptoms of injury or illness. The court called in Kenneth O'Connor, Esq., to whom Galante had spoken the previous week about representing him, and assigned him to represent Galante. Galante objected to this assignment, objected to representing himself, and failed to get other counsel. Galante's claim that he was denied the effective assistance of counsel of his own choice is sufficiently answered by what we said in relation to the similar

claims of the Panicos and Loicano. The happenings below demonstrate quite forcefully why the courts have had occasion to say that the right to counsel cannot be manipulated so as to interfere with the fair administration of justice. The trial court's conclusion that manipulation was afoot is not so devoid of basis as to require reversal.

3. *Mirra*

Mirra contends that he was denied the right to act as his own counsel by the trial court's denial of his request to discharge his defense counsel and conduct the cross-examination of the chief government witness, Smith, himself. Mirra had been represented with great skill throughout the trial by appointed counsel. Mirra indicated no dissatisfaction with his counsel and apparently relied solely on his right to represent himself. One charged with crime has an absolute right to do without an attorney and conduct his own defense (28 U. S. C. § 1654), but that is quite different from the right to discharge counsel after trial has begun. This latter right is a qualified one. *United States ex rel. Hyde* v. *McMann*, 263 F. 2d 940 (2d Cir.), cert. denied, 360 U. S. 937 (1959); *United States* v. *Dennis*, *supra*; *United States* v. *Mitchell*, 138 F. 2d 831 (2d Cir. 1943), cert. denied, 321 U. S. 794 (1944); *United States* v. *Gutterman*, 147 F. 2d 540 (2d Cir. 1945). The contention of Mirra is much like the claim that was raised in *United States* v. *Dennis*, *supra*. We there said:

> "If the judge feared that the result would be, as he said, another of those 'outbursts' which he had found it so hard to deal with, it appears to us that he was within his powers to confine Davis to the exceptionally capable protection of Mr. Sacher. To deprive a judge of that much control over such an issue would play into the hands of any accused who

might seize the opportunity still further to confuse a trial, already much confounded.'" 183 F. 2d at 234.

The record discloses that Mirra had excellent representation by counsel who took advantage of every opportunity by motion, examination and cross-examination to protect his interests.

D. *The Charge*

Appellants contend that the court "failed at any point in his charge on the conspiracy count to instruct the jury that knowledge of illegal importation was a necessary element of the conspiracy", and thereby committed the plain and reversible error we condemned in *United States* v. *Massiah*, 307 F. 2d 62, 70 (2d Cir. 1962). We hold that the charge was sufficient.

At the beginning of the charge on conspiracy, the trial court had the first four paragraphs of the conspiracy count of the indictment read to the jury. These paragraphs, after enumerating the defendants and conspirators, specifically stated the purpose of the criminal enterprise —to unlawfully import narcotics into the United States, and to deal in narcotics knowing them to have been illegally imported. Immediately thereafter, the court, in substance repeated what had just been read, by explaining that the defendants were charged with conspiring to violate Sections 173 and 174 of Title 21 U. S. C., and by reading the pertinent portions of the statutes.

There is thus an important difference at the outset between the charge in the present case and that given in *Massiah*. In *Massiah*, the trial court read the appropriate portions of 21 U. S. C. § 173 and § 174 to the jury, but he also read the conspiracy section of the Criminal Code, 18 U. S. C. § 371, and expressly instructed the jury that it was the violation of this provision that was charged in the

indictment. The indictment was not read to the jury at all. The many references in the remainder of the court's instructions as to the conspiracy "charged in the indictment" simply compounded the error.

In the present case, the court, at the very outset of the conspiracy charge, read both the indictment and the statutes, 21 U. S. C. §§ 173, 174 under which the defendants were being tried. He did not read the general conspiracy statute, 18 U. S. C. § 371. It must thus have been clear to the jury from the outset that the defendants were charged with conspiring to import narcotics or to deal in them, knowing of their illegal importation. Each reference thereafter to the conspiracy "as charged in the indictment" rather than compounding the error re-emphasized the need for such a finding, and directed the attention of the jurors to the appropriate language in the copy of the indictment that they had with them during their deliberations.

After reading the statutes and the indictment, the court continued:

> "There are only three elements of the crime of conspiracy:
>
> (1) The existence of the conspiracy *as charged in the indictment*;
>
> (2) That a defendant knowingly and with wilful intent associated himself with the conspiracy; and
>
> (3) The commission by any conspirator of at least one of the overt acts set forth in the indictment." (Emphasis supplied.)

Then, in discussing the first element, he charged:

> "The first element is satisfied if, from proof of all the relevant facts and circumstances, you find

> beyond a reasonable doubt that the minds of at least two alleged co-conspirators met in an understanding way so as to bring about an agreement to illegally import and distribute narcotics as charged."

Appellants urge that this language rendered the charge even more erroneous than that in *Massiah* because the jurors were thus "affirmatively told that they could find all the appellants guilty on count eight if but two of the conspirators knew about the illegal importation." On the contrary, this sentence, read in context,[12] permitted the jurors to convict only as to those defendants who knew of the illegal importation, and thus saved the charge from error. Very shortly following this sentence, the court further charged:

> "You may find that the conspiracy existed even if you find that one or more of the persons charged were not members. It is sufficient if any two or more persons have conspired. *You may find those defendants guilty who joined the conspiracy with knowledge of its purpose and acquit those who did not join.*" (Emphasis supplied.)

It was thus made clear that as few as two may be conspirators, but that each must know of the illegal importation. The first passage quoted defined conspiracy, the second, its members.

Later, in dealing with the distinction between single and multiple conspiracies, the court reiterated this analysis:

> "Such a conspiracy [single] may be shown to exist, you will recall, if two or more of the defendants or co-conspirators in some way or manner came to a mutual understanding to accomplish the broad

[12] *See United States* v. *Amico*, *supra*, at 825; *Carey* v. *United States*, 296 F. 2d 422, 426 (D. C. Cir. 1961).

objectives set out in the indictment. Whether or not each defendant joined this conspiracy is another matter which I shall come to in a moment."

Finally, the judge concluded his instructions as to the existence of the conspiracy, and began his charge on its membership as follows:

> "If, after considering all the evidence, you decide that the government has failed to prove, beyond a reasonable doubt, the existence of one overall conspiracy *to import and deal in narcotics illegally as charged*, you must acquit all the defendants on count 8.
>
> "On the other hand, if you are satisfied, beyond a reasonable doubt, that the government has proved one overall conspiracy to import and deal in narcotics illegally as charged, *the second element which you must next decide, as to each defendant separately, is whether the government has proved, beyond a reasonable doubt, that he knowingly and intentionally joined or became a member of the conspiracy with knowledge of its unlawful purpose.*
>
> • • •
>
> "The mere fact, however, that a defendant may be present at meetings or associated with members of the conspiracy is not in itself enough to make him a conspirator unless you first find that he intentionally joined a conspiracy *with knowledge of its purpose.*
>
> "Those who come in later, *with knowledge of the aims and purposes of the conspiracy*, and cooperate in a common effort to attain the unlawful results, become parties to the conspiracy. All of the conspirators need not be acquainted with each other.

> They may not have previously associated together. One may become a member of the conspiracy without full knowledge of all of the details of the conspiracy. One defendant may know only one other member of the conspiracy, yet, *if he knowingly cooperates to further the object of the conspiracy*, with knowledge that others have combined to violate the law, he becomes a member although his role may be only a subordinate one." (Emphasis supplied.)[13]

Defense counsel did not except to these portions of the charge. Certainly the lack of further emphasis on this element did not amount to that "plain error" necessary to warrant reversal in the absence of exception taken below. See Fed. R. Crim. P. 30, 52(b). There is no "plain error", unless the "charge may have resulted in a miscarriage of justice or in the denial to appellant[s] of a fair trial." *Herzog* v. *United States*, 235 F. 2d 664 (9th Cir. in banc), cert. denied, 352 U. S. 844 (1956). That is not the case here.[14]

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13 This sentence was held in the context of the *Massah* charge to have compounded the error therein. In the context of the entire charge in the present case, it was clearly correct. See *United States* v. *Aucci*, *supra*, at 825; *United States* v. *Aviles*, *supra*, at 188.

14 Several appellants contend that in marshalling the evidence the trial court erred in failing to mention certain details favorable to them. We shall deal with several specific allegations of error at a later point. Reviewing the charge as a whole, we find that the trial judge carefully and specifically summarized the evidence favorable to the defendants as well as that favorable to the government, in a manner well designed to insure separate consideration by the jury of the evidence for and against each individual defendant. In exercising his broad discretion in marshalling the evidence, the trial judge was not required to comment on every tidbit of evidence in the lengthy trial that each litigant considered most favorable to him. *Allis* v. *United States*, 155 U. S. 117, 124 (1894). Moreover, the judge carefully instructed the jury that it must consider all the evidence, that he could not review the

E. ***Limitations on Cross-Examination of Smith***

Appellants complain that they were unduly restricted in their cross-examination of the witness Smith. We find no merit in the contention. The trial court permitted extensive and repetitious examination of Smith as to any matters bearing on his credibility, his bias toward the defendants, and his motive for testifying. In addition, the defense had an abundance of material from which to examine Smith, including but not limited to, a statement produced under the Jencks Act, extensive grand jury minutes, Smith's testimony in the first trial, his testimony in an unrelated proceeding in Illinois, and his testimony before an Inquiry Officer of the Immigration and Naturalization Service in 1958. Defense counsel were allowed great latitude in utilizing these materials and were permitted to inquire into many matters of a remote nature. See, *e.g.*, *United States* v. *Aviles*, *supra*.

F. ***Cadieux Testimony***

Several defendants raise objections to the reading to the jury of the testimony given by Suzanne Cadieux at the

14 (Continued)

evidence in its entirety, that his reference to certain evidence and not to other evidence did not indicate that he considered that which he mentioned more important, and that in any event, it was the jury's recollection that controlled.

The appellants further contend that the trial judge committed reversible error by taking from the jury the factual issue of whether the witness Smith was an accomplice in the conspiracy, and in effect instructed them that Smith was an accomplice as a matter of law. Appellants misread the charge. In the passage complained of, the trial court correctly restated Smith's testimony that, by his own admission [he was] an accomplice" in the crime charged. He then cautioned the jury that in light of this admission, it must scrutinize Smith's testimony with special care. This instruction, framed in almost identical language, was approved by this court in *United States* v. *Lanier*, *supra*, at 833.

first trial. She had there testified that in December of 1958 she had seen the defendant DiPietro make a payment of $47,000 to Pepe Cotroni for the delivery of a package of narcotics and that in February of 1959 she saw Galante meet with the Cotroni brothers, Stepanoff, Robert and an American attorney to arrange for the delivery of $5,500 worth of heroin to that attorney. She also testified as to the incident in which she was threatened by the defendant Mirra after Cotroni's arrest.

On January 9, 1962, Mlle. Cadieux executed an affidavit in Canada, disclosed by the Government early in the retrial, recanting her prior testimony in its entirety and stating that it was all a lie induced by her desire to help Rene Robert then incarcerated in Canada. Her affidavit also contained implications of subornation of her perjury on the part of the Assistant United States Attorney.

At the second trial, the Government moved for permission to read her testimony given at the first trial to the jury on the grounds that she was unavailable as a witness. A *voir dire* on this motion disclosed that the Government's efforts to contact her after her recantation had met with no success, although defense counsel encountered no such difficulties. The Court properly held that she refused to come to the United States as a witness without any complicity on the Government's part, apparently out of fear that she would subject herself to a perjury charge here if she were to testify at the second trial. The trial judge, however, was also of the view that her prior testimony should not be admitted without some disclosure of the exculpatory matter, and permitted defense counsel to take her deposition in Canada as if it were cross-examination. The Court's finding of her unavailability is buttressed by her refusal to be deposed at the United States Consulate in Montreal, necessitating transfer of proceedings to the

Sheraton Mount Royal Hotel. Both her prior testimony and her deposition were read to the jury.

We find no error in this manner of proceeding. Unavailability having been fairly established, her prior testimony was admissible. *Mattox* v. *United States*, 156 U. S. 237 (1895); 5 Wigmore, Evidence, § 1404 (3d ed. 1940). See also *West* v. *Louisiana*, 194 U. S. 258 (1904). Allowing the deposition to be taken without subjecting the witness to the perjury sanctions available if she had testified here may have given the defendants even greater latitude than they were entitled to. *United States* v. *Sobleu*, 203 F. Supp. 542, 568 (S. D. N. Y. (1961), aff'd 301 F. 2d 236 (2d Cir.), cert. denied, 370 U. S. 944 (1962). There is no merit to the contention that Cadieux's recantation made her prior testimony totally inadmissible. The subsequent extra-judicial statement was merely impeaching material on the credibility of her prior testimony and it was for the jury to decide which, if either, statement was to be believed.

Due to the charges levelled in the Cadieux affidavit at the Assistant United States Attorney, he was permitted to take the stand to testify that at the time Cadieux testified at the first trial, he believed she was telling the truth. The Judge instructed the jury that he was allowing this testimony because if the Assistant believed that Cadieux was lying when he put her on the stand, the jury should acquit the defendants. This testimony was not offered to enhance the credibility of Cadieux' first trial testimony but rather to rebut serious accusations against the Government officer trying the case which, if left unanswered, might have seriously prejudiced the Government. The defense having introduced such material, the Government was clearly entitled to answer it. Cf. *United States* v. *Graham*, 102 F. 2d 436, 441-443 (2d Cir. 1939). Perhaps the questioning might have been more artfully framed so as to avoid any appear-

ance of the witness's vouching for Cadieux's credibility, but we find no reversible error here. *Lawn* v. *United States*, 355 U. S. 339, 359 n. 15 (1958).

II

A. *Salvatore Panico*

Salvatore Panico urges that because the trial judge precluded him from testifying in his own behalf, his conviction be reversed.

After several earlier hints, one of the two attorneys representing the Panico brothers informed the court toward the end of the trial that despite counsel's advice to the contrary, Salvatore desired to testify in his own behalf. Counsel were in a somewhat embarrassing position in this regard, having represented to the trial court and to this court in an attempt to mandamus a second psychiatric examination of their client, that they could not communicate with him. Since neither attorney desired to call him, the court directed them to confer with him and his brother again and to advise the court of their decision. Subsequent to this conference, during which Salvatore refused to speak with his attorneys, Carmine Panico, his brother, informed the court that Salvatore still desired to take the stand. The court then called Salvatore before him and informed him that he could testify only to facts. He responded that he only wanted to tell "the truth". The court then continued:

> "The Court: But let me tell you now that you cannot take that stand and make any outburst against anybody else.
>
> "Defendant Salvatore Panico: No, I am just going to say the truth, that's all.
>
> "The Court: Are you going to behave as a gentleman on that stand?

"Defendant Salvatore Panico: I am going to say the truth, that's all.

"The Court: Are you going to behave as a gentleman?

"Defendant Salvatore Panico: What do you mean?

"The Court: Behave yourself up here.

"Defendant Salvatore Panico: I am going to say the truth up there. That's what you want. That's what the whole world wants is the truth.

"The Court: You have a right to take the stand."

The court then further advised Panico of his right to remain silent, that he must behave himself on the stand, and that he would be "very severely" punished for contempt if he did not. Finally, the court ordered a fifteen-minute recess and ordered counsel to "prepare him to go on the stand." During the recess, the court overruled an objection by counsel for Ormento to Salvatore's taking the stand, and conferred with his attorneys and with Carmine Panico regarding the questions to be asked. The court warned the marshals to be alert, and ruled that Salvatore would testify from his place in the courtroom, rather than from the witness stand, so that he would be easier to handle in case of a second jury attack or other misconduct.

After dealing with another matter, the court asked counsel whether they could represent to him what Salvatore would testify to. Counsel answered that since he refused to speak to them, they could not say. Thereupon the court ruled:

"I had him up there before me and he wouldn't answer. When I asked him whether he would behave, he kept shouting he is going to tell the truth.

"I hold, under the circumstances, that he has waived his right to take the stand in his own defense.

> By his failure to cooperate for psychiatric examination and because of his conduct the risk of prejudicing the other defendants is overwhelming. He has done that time and time again and done so wilfully and deliberately. For those reasons I hold that he voluntarily waived his right to take the witness stand in his own defense."

At common law, the accused was not competent to give sworn testimony in his own behalf in a criminal proceeding. It was thought that competency would be more harmful than helpful to the accused, since the jury might infer guilt if he then failed to take the stand, while cross-examination might place him in a situation where even an innocent man might appear at a disadvantage if he did testify. And it was believed that due to his overwhelming interest in the outcome, testimony of the accused would not and could not be believed. See 2 Wigmore, Evidence § 579 (3d ed. 1940). The right of the accused to be present and to make his defense was jealously guarded, however:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Windsor v. *McVeigh*, 93 U. S. (3 Otto) 274, 277 (1876).

Toward the end of the last century, the fallacy of the view denying the competence of the accused to testify came to be generally recognized. A federal statute removing the

disability was enacted in 1878, 30 Stat. 20, and is contained today without substantial change in 18 U. S. C. § 3481.[15] Similar provisions have been enacted in all states except Georgia. See *Ferguson* v. *Georgia*, 365 U. S. 570 (1961).

This statutory "privilege" to testify in one's own behalf has come to be recognized as having an importance similar to the right to be present at one's trial and to present a defense. Thus in *Wilson* v. *United States*, 149 U. S. 60 (1893), the court, after referring to the common law rule, said:

> "This rule, while affording great protection to the accused against unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he would readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. In mercy to him, he is by the act in question permitted upon his request to testify, in his own behalf in the case. In a vast number of instances the innocence of the defendant of the charge with which he was confronted has been established." *id.* at 65-66

The privilege has been described as one of "inestimable value." *Yates* v. *United States*, 227 F. 2d 844, 846 (9th Cir. 1955). The statute renders the accused competent "provided *only* that he testifies at his own request." *Heitler* v. *United States*, 244 Fed. 140, 141 (7th Cir. 1917) (emphasis supplied). See also *Brown* v. *United*

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15 "§ 3481. Competency of accused.

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. June 25, 1948, c. 645, 62 Stat. 833."

States, 56 F. 2d 997 (9th Cir. 1932); *Wolfson* v. *United States*, 101 Fed. 430 (5th Cir. 1900). It has been held by at least one state court that denial of the privilege deprives the accused of a fair trial. *People* v. *Rakiec*, 260 App. Div. 452, 23 N. Y. S. 2d 606 (1940), aff'd 289 N. Y. 306, 405 N. E. 2d 812 (1942). See also *People* v. *Rosenzweig*, 135 Misc. 324, 239 N. Y. S. 358 (Sp. Sess. 1929).

In view of the importance of the privilege, we cannot say that Salvatore Panico waived his privilege to testify in his own behalf. The question appears to be one of first impression, and while we do not wish to indicate that the privilege may never be waived by conduct, the facts in the present case do not warrant that conclusion. Panico's outbursts and serious misconduct earlier in the trial would have warranted a warning that violence on his part or the hurling of obscenities at the objects of his dislike might result in a curtailment of the privilege of testifying. However, that Panico, when testifying, might have attempted to incriminate all the other defendants and to exonerate himself, was to be expected. He might well have desired to testify for this very purpose but this purpose, even if announced in advance, presents no reason for court or counsel for other defendants to preclude him from so doing. He had a right to say in effect, "I never trafficked in narcotics; such narcotics as I saw were in the possession of defendants A, B and C." Whether the jury would have believed him is immaterial; he should have had the opportunity to present his version of the facts. The trial judge is, of course, under a heavy duty to maintain the order and decorum necessary for a fair trial. By permitting Panico to testify, the court might have risked further outbursts. But upon any sign of misconduct, the marshals could quickly have subdued him, and replaced his gag for the remainder of the trial if necessary. The judgment of conviction of Salvatore Panico must be reversed.

B. *Carmine Panico.*

Appellant Carmine Panico urges that the error for which we reverse the conviction of his brother Salvatore requires reversal of Carmine's conviction as well. We do not agree.

The questions raised by Carmine's appeal in no way involve the right of a defendant to testify in his own behalf. Rather, the question relates to the discretion of the trial court to preclude counsel for a criminal defendant from calling a certain witness other than the defendant himself. At the outset, it should be noted that counsel did not attempt to call Salvatore as a witness for Carmine and so he may not complain that the witness was not heard.

Even if Carmine's failure to call Salvatore as his witness may be excused because of the obvious futility of such an attempt, there is no error that warrants reversal of Carmine's conviction. Carmine had already testified in his own defense when Salvatore sought to testify. No tender of proof having been made, we may assume that he, if permitted to testify, would have corroborated his brother's story and his testimony would thus have been cumulative. While such corroborative testimony may be of considerable importance, its admission in evidence rests in the sound discretion of the trial court, Fed. R. Crim. P. 26; 6 Wigmore, Evidence §§ 1907, 1908 (3d ed. 1940). Under the facts presented, where the corroborating witness sought to be called has made numerous outbursts and engaged in physical misconduct, the trial judge might have concluded in the exercise of discretion, that Salvatore Panico would not confine himself to proper testimony in behalf of Carmine, and in view of the risk of prejudice to the other

defendants, have precluded Carmine from calling him as a witness.[16]

C. Galante

Galante contends that the trial judge abused his discretion in limiting the number of alibi witnesses that he could call in his behalf. Smith had testified to seeing Galante in New York on two separate occasions sometime in June, 1958. The alibi offered was that Galante was in Florida during this period and thus could not have been seen by Smith at the time testified to. Three witnesses testified to this effect on behalf of Galante. The trial judge then ruled that only two more witnesses would be allowed to testify to Galante's presence in Florida on the ground that such testimony was cumulative. The court later revised this ruling to allow Mr. O'Connor, who was then representing Galante, to put on all of his alibi witnesses. Mr. O'Connor could not produce any more witnesses but was allowed to read the prior trial testimony of two of these witnesses to the jury. The judge's offer to permit him to read to the jury the prior testimony of another witness was declined.

Galante's claim here is difficult to understand inasmuch as the trial court gave him the opportunity to call as many alibi witnesses as he desired and, when they were not available, allowed their prior testimony to be read to the jury. If the first ruling was error, and we intimate no such view, it was certainly cured by the later ruling.

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16. Appellant Galante claims error in that if Salvatore Panico had been permitted to testify, Galante could have shown on cross-examination that Panico's outburst placing Galante at the Appalachin meeting was false. This allegation is totally without merit. All that we have said with regard to Carmine's contention applies with equal force here. Moreover, Salvatore's outburst was not testimony, and he could not properly have been cross-examined regarding its truth or falsity.

Galante also contends that wiretaps made in violation of § 605 of the Federal Communications Act furnished the basis for the testimony of witness Cadieux and for the indictment. Judge Levet, on the first trial, held an extensive *voir dire* on wiretap problems and concluded that "there has been no indication whatsoever that information obtained from taps has * * * led directly or indirectly, to the discovery of any of the evidence which the government has utilized in the prosecution of the case." Judge Levet was correct. See *United States* v. *Agueci*, *supra*. The wiretaps in question occurred some nine months after Smith began to cooperate with the Government and six months after he had introduced Agent Biase into the conspiracy. The inferences appellant would have this court draw are without foundation in the record.

D. *Mirra*

Appellant Mirra raises several claims of error apart from those already discussed as to all defendants. His first contention is that the indictment should have been dismissed on the grounds of double jeopardy, alleging that he had been convicted of the same offense in *United States* v. *Stromberg*, Cr. 154-86, S. D. N. Y. 1958, aff'd. 268 F. 2d 256 (2d Cir. 1959), cert. denied, 361 U. S. 863 (1959). His motion to dismiss on these grounds was denied by Judge MacMahon, who adopted the earlier opinion of Judge Levet at the first trial, Opinion #26832 (S. D. N. Y.). We agree with Judge Levet's conclusion that "The Stromberg and Bentvena conspiracies constitute in fact and law distinct and separate ventures." See *United States* v. *Perroni*, 161 F. Supp. 252 (S. D. N. Y. 1958). Comparison of the two cases demonstrates disparate factual contexts. Anthony Mirra was the only defendant common to both prosecutions, the overt acts delineated in *Stromberg* took place between

1951 and 1955 while those in *Bentvena* took place in 1958 and 1959; the source of the narcotics in *Stromberg* was France; in *Bentvena* it was Canada. Neither proof of the facts alleged in the *Bentvena* indictment nor the proof actually submitted would have been sufficient to convict Mirra of participation in the conspiracy charged in *Stromberg*. See *Ferracane* v. *United States*, 29 F. 2d 691 (7th Cir. 1928); *United States* v. *Claus*, 19 F. Supp. 435 (E. D. N. Y. 1937).

Mirra also claims as error the disclosure by the Government to the jury of his prior narcotics conviction in *Stromberg, supra*. In the *Bentvena* trial, Mirra took the stand in his own defense and testified that he had been convicted of a crime in 1958. When asked on direct examination if he had ever had anything to do with narcotics, he answered "No". On cross-examination the Government was permitted, over defense objection, to ask Mirra what the 1958 conviction was for, and to introduce into evidence the record of his prior conviction. Although such evidence might, in the discretion of the trial judge, have been excluded if offered for general impeachment purposes, the defendant, having asserted on direct that he never had any connection with narcotics, opened the door to proof impeaching this specific testimony. Cf. *United States* v. *Colletti*, 245 F. 2d 781 (2d Cir.), cert. denied, 355 U. S. 874 (1957); *United States* v. *Nelson*, 273 F. 2d 459 (7th Cir. 1960). The trial judge properly instructed the jury that this evidence could be used only for impeachment purposes and not to prove Mirra's guilt.

In addition, Mirra argues that he was improperly denied certain surveillance reports by officials of the New York State Parole Board and the New York City Police Department covering the period of May and June, 1958, during which Smith and Mirra had allegedly been engaged in

various narcotics transactions. The surveillance had been initiated to secure evidence of possible parole violations by the severed defendant David Petillo, and were later turned over to the State Liquor Authority which was investigating Mirra's alleged undisclosed interest in Chickie James' Stable and La Comedie. The trial judge orginally denied the reports on the ground that they were privileged, and finally after examining them *in camera*, declined in his discretion to make them available and ordered them sealed.

Passing questions of whether they were privileged information and whether there was sufficient evidentiary basis for their production, see *United States* v. *Iozia*, 13 F. R. D. 335 (S. D. N. Y. 1952), having inspected these reports, we find no prejudice to the defendant by virtue of their non-disclosure. The direct testimony by Smith on this phase of the case is not specific as to dates, but described events only as having occurred early or late in May and June. The surveillance was directed primarily at the activities of Petillo, and was in no way comprehensive enough in coverage either as to time or area to be of any value to Mirra for impeachment purposes. Furthermore, to the extent that the reports place Mirra, Smith, Fernandez and Petillo in frequent company at Johnny's Keyboard and at Chickie James' Stable, they tend more to corroborate than to impeach the testimony of Smith.

Mirra finally contends that the court improperly denied his motion to suppress evidence allegedly obtained by illegal wiretaps. His claim is that the surveillance already discussed was the result of wiretaps by state authorities during the period from February to October, 1958. Judge Levet found on the first trial, after conducting an extensive *voir dire*, that there was no indication that information obtained from the taps was transmitted to federal agents. The only federal participation alleged by Mirra is the fact that narcotics agent Rowan was shown the contents

of the reports which he used when he subsequently questioned Smith in January, 1960. As Smith had already become an undercover employee of the Narcotics Bureau well before his contact with Rowan, these state wiretaps did not bear any relationship to the evidence secured by the federal government against Mirra.

E. *Mancino*

Appellant Mancino also asserts several claims of prejudicial error at the trial. At the time of the negotiations by Smith and Biase to set up a new outlet for narcotics supplied by Cotroni, Cotroni indicated that objections to this new outlet were being raised by some of his New York people, one of whom he indicated to be Mancino. Cotroni also stated that at one time he had considered Mancino to be a "good man", but that Mancino was on his way down, and the only reason Mancino was good was that he knew all the right people. Mancino contends that these statements were hearsay declarations outside his presence, and were inadmissible because in furtherance of a separate conspiracy in direct conflict with the one charged in the indictment. It is quite true that Cotroni indicated to Smith and Biase that they would be taking $150,000 to $200,000 worth of business from some of these other people, but even if so, a new outlet would be a transfer rather than a conflict with the old conspiracy. A conspiracy, once established, is presumed to continue until the contrary is demonstrated and, as we said earlier, a conspiracy of this kind by its very nature is constantly expanding. There is no indication that Cotroni had any intention of totally severing his supply lines to his other outlets in New York City, including Mancino. While certain of Cotroni's remarks, such as statements to the effect that Mancino used to be a good man, might be considered as inad-

missible because purely narrative in character, see *United States* v. *Goodman*, 129 F. 2d 1009 (2d Cir. 1942), others clearly were not, see *United States* v. *Tarricone*, 242 F. 2d 555 (2d Cir. 1957), and any error in admitting the purely narrative declarations was harmless in view of the overwhelming evidence of Mancino's participation. Fed. R. Crim. P. 52(a).

Mancino complains of the refusal by the trial judge to permit the admission of the first trial testimony of Mrs. Susini, the wife of a Parisian attorney. Smith had testified that at the Montreal meeting in April or May of 1957 which Mancino had attended, he met "Pepe" Cotroni as he was leaving the meeting. Cotroni's wife testified that her husband left for Paris in March, 1957, and she did not see him again until May 12, 1957, in Paris. Mrs. Susini had testified at the first trial to seeing Cotroni in Paris on May 5, 1957, and frequently thereafter during the remainder of the month. On a *voir dire*, the defense sought to establish that Mrs. Susini was unavailable on the second trial, thus justifying the use of her prior testimony. Having failed to do so by competent testimony, Mancino's attorney requested permission to take her affidavit in Paris through his Paris office. The Judge denied this request in his discretion on the grounds that it was both collateral and cumulative testimony. We agree that this was merely collateral impeaching material which it was within the Judge's discretion to reject. See McCormick, Evidence § 47 (1954).

In addition, Mancino claims that the Government on summation misquoted the record in belittling an alleged inconsistency, pointed out in defense counsel's closing, between Smith's testimony at the two trials. Mancino argues that the Judge's refusal to correct this misstatement constituted reversible error. Counsel attempts to denominate this inconsistency as "vital", but it is only one

of many minor inconsistencies in Smith's testimony brought to the attention of the jury by the defense.

F. *Sciremammano*

Sciremammano contends that the indictment should have been quashed as to him because Smith made no mention in his Grand Jury testimony of Sciremammano by name. However, Smith did testify that he gave narcotics at the Squeezinn Bar to someone named Sal who had a club foot. This was sufficient identification of this defendant. As the Supreme Court in *Costello* v. *United States*, 350 U. S. 359, 363 (1956) stated:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. * * *" An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."

G. *Bentvena, Monastersky and Struzzieri*

The facts developed with respect to the purchase and delivery of heroin which involve Bentvena, Struzzieri and Monastersky constitute the proof which formed the basis of the prosecution's case against them as charged in counts 4 and 5. On January 5, 1959, Agent Giorgio of the Bureau of Narcotics met appellant Monastersky on East 116th Street in Manhattan and on the following day ordered one-half kilogram of heroin from him for $6,000. Monastersky arranged for delivery that evening. During that evening, other agents of the Bureau of Narcotics followed Monastersky and saw him enter 525 East 88th Street.

Several minutes later, a car driven by the defendant Marcantonio Orlandino entered the block. Struzzieri alighted from it and entered the same building carrying a package covered with blue and white Christmas wrapping paper. After some time he emerged empty-handed and drove off with Orlandino. Shortly thereafter Monastersky came out and drove out of the area. Later, the agents observed the co-conspirator, McGovern, come out of the building carrying a package of similar size and wrapping and followed him to 448 East 87th Street.

Later that evening, Agent Giorgio met Monastersky and was told by him that his partner had the "stuff". Monastersky took him to an apartment at 448 East 87th Street and introduced him to McGovern, who threw a package wrapped in blue and white Christmas wrapping paper on the table. Giorgio tested the contents and told Monastersky that it was "junk". The three men left the apartment and went downstairs where Giorgio handed McGovern $6,000 and McGovern gave the agent the narcotics. Another agent saw McGovern and Monastersky return to 525 East 88th Street where they met Struzzieri and Orlandino. Struzzieri and Orlandino left and were later overheard discussing Agent Giorgio's unwillingness to part with the money in advance of receiving the narcotics.

On January 13, 1959, Giorgio ordered more narcotics, agreeing to meet Monastersky that evening. They met and proceeded to 525 East 88th Street where they were told to return in an hour, Monastersky explaining to the agent that the "junk" wasn't there yet. Approximately 50 minutes later, Bentvena and Struzzieri entered the building. Giorgio returned, accompanied by Agent Mangiaracina, who was introduced to Monastersky by Giorgio as his partner. While Mangiaracina waited in the lobby at 525 East 88th Street, Monastersky and Giorgio went to a second-floor

apartment, passing Struzzieri and Bentvena on the way in. Giorgio, on being told by McGovern that these two were the delivery boys, asked McGovern to tell them not to become apprehensive of Mangiaracina, who was in the lobby, as he was Giorgio's partner. McGovern went to the house-phone, spoke into it, and returned saying the junk would be there in a few minutes. Struzzieri and Bentvena walked to a car parked on 88th Street, opened the trunk, and removed a package which Bentvena tucked under his arm. Both men returned to McGovern's apartment, walking past Mangiaracina who was still in the lobby, and delivered the package to McGovern. The sale to Giorgio was then consummated.

In subsequent conversations between McGovern and Giorgio, McGovern discussed his overhead—$200 to Monastersky and $50 to the delivery boys. When, after numerous conversations between Giorgio, Monastersky and McGovern, agreement on the terms of future transactions could not be reached, negotiations were discontinued.

The evidence allegedly connecting Monastersky, Bentvena, and Struzzieri to the conspiracy consisted of (1) a glassine bag filled with narcotics seized from Marcantonio Orlandino evidencing a puncture sealed with an "X" in Scotch tape, (2) Orlandino's phone book containing a phone number alleged to be Tuminaro's, and (3) the hearsay remarks of Cotroni to Smith to the effect that the narcotics seized from Orlandino had belonged to "Bootsie" and "Augie" (Tuminaro and DePasqua) and had been supplied by Cotroni and that the "X" Scotch tape covering of the puncture was his trademark.

Although it is clear that the hearsay declarations of a conspirator are admissible against his co-conspirators if made pursuant to and in furtherance of the conspiracy, *Clune v. United States*, 159 U. S. 590, 593 (1895); *Fiswick*

v. *United States*, 344 U. S. 604, 617-18 (1953), it is equally clear that there must be independent evidence establishing a defendant's participation in the conspiracy before such declarations are admissible against him. *Glasser* v. *United States*, 315 U. S. 60, 74-75 (1942); *United States* v. *Consolidated Laundries Corp.*, 291 F. 2d 563, 576 (2d Cir. 1961); *United States* v. *Stromberg*, 268 F. 2d 256, 265-67 (2d Cir. 1959). A defendant's "participation in the conspiracy, which the Government sought to prove can be established only by proof, properly admitted into evidence, of their own words and deeds." *United States* v. *Russano*, 257 F. 2d 712, 713 (2d Cir. 1958). Such independent proof must be substantial and not "too slight." *United States* v. *Consolidated Laundries Corp.*, *supra*; *United States* v. *Stromberg*, *supra*.

The Government's independent proof of participation fails to meet this standard and is tenuous at best. For the first time on appeal, the Government places primary reliance on the so-called Cotroni trademark found on the narcotics seized from Orlandino. Assuming *arguendo* that a Cotroni trademark was sufficiently established, nevertheless, that finding would have to be bottomed solely on the hearsay remarks of Cotroni. No independent evidence admissible against these defendants establishes the existence of such a trademark. In fact, the sole independent evidence available to connect these defendants with the conspiracy is the presence of the phone number, alleged to be Tuminaro's, in Orlandino's phone book. To find this to be of significance would be tantamount to holding that the mere association of conspirators is sufficient basis for a finding of participation. This notion we have already explicitly rejected. *United States* v. *Stromberg*, *supra*, at 267. The Cotroni hearsay thus being inadmissible against them, the Government failed to prove these defendants' participation in the overall conspiracy, and their con-

spiracy convictions must be reversed. My colleagues, however, believe that the joinder of the substantive and conspiracy counts against Bentvena, Monastersky and Struzzieri with the conspiracy count against the other defendants was so prejudicial as to also require reversal of their convictions on substantive counts 4 and 5. Therefore, the balance of this opinion expresses my dissent from the views set forth in the opinion of Judge Smith.

Struzzieri, Monastersky, and Bentvena contend, and the majority agree, that reversal of their substantive convictions is required, first, because they were improperly joined in this indictment, second, because they were tried in this mass conspiracy trial and, third, because evidence, particularly hearsay evidence, was admitted under the conspiracy count and the court failed to adequately instruct the jury that such evidence could not be used to convict under the substantive counts. In my opinion, the decision of the majority adopting these arguments represents a radical departure from the practice heretofore sanctioned in this circuit and elsewhere and may, in my view, effectively bar any joinder of substantive and conspiracy counts in criminal prosecutions.

Turning to the first contention of appellants—improper joinder, it is settled that failure of the prosecution to present sufficient independent evidence of the participation of these three defendants in the conspiracy charged does not require the conclusion that the indictment was improperly obtained *ab initio* or that the conspiracy and substantive counts were improperly joined. *United States v. Schaffer*, 362 U. S. 511 (1959). An indictment merely contains the charges which the prosecution hopes to prove—a platitude dinned into the ears and minds of the jurors throughout the trial. To anyone familiar with the courtroom scene, the cases are legion in which defendants are convicted on some

counts, acquitted on others, cleared of conspiracy, convicted on substantive counts, and vice-versa. Witnesses to support the indictment may or may not be available or they may change their stories upon the trial. Alibi witnesses may suddenly appear to refute the Government's witnesses. In other words, the mere fact that the Government fails as to one or more counts does not mean that the indictment was improperly obtained or secured in bad faith. These should be elementary truisms.

The next asserted ground for reversal—that these three appellants were prejudiced by being tried in this mass conspiracy trial, is articulated by the majority as concern over the fact that they were "forced to sit through months of testimony establishing the conspiracy, none of which related to the substantive accusations." Much of what has just been said as to joinder is applicable here. Since these appellants were properly joined in this indictment, it is difficult to understand why they should not have been tried under it. Determination of whether there was sufficient proof to implicate them in the conspiracy had to await the end of the case. If, at that point, the trial judge, the jury or (later) an appellate court finds that the prosecution has not proved its case on the conspiracy count, the defendants are not, solely because they have been forced to sit through a long trial, entitled to the bonus of acquittal or reversal on the substantive counts which the government has proved.

The critical inquiry here is whether severance was required because of possible prejudice arising from the joinder of these three appellants with the other defendants. *United States v. Schaffer, supra.* A realistic approach to this question requires consideration of the nature of the narcotics conspiracy itself and a review of some recent decisions of this Court.

Investigation of a narcotics ring usually has its origin in a sale or series of sales made to narcotics or undercover agents. The salesmen, however, are as a rule on the outer fringe—the lowest echelon in the hierarchy of narcotics rings. Note, in passing, the "delivery boy" status ascribed to Bentvena and Struzzieri who for $20 apiece were in actual possession of a commodity retailing at $6,000 a half kilo. Quite frequently, the ringleaders or overlords of the narcotics business do not stultify themselves by possession when handlers can be so cheaply hired. Therefore, in an effort to bring a modicum of reality into the picture, the courts in the absence of Congressional action have had to create the doctrine of constructive possession or control. But the Government has learned that the occasional arrests of mere sellers will not seriously impede the drug flow. It is necessary, if possible, to apprehend those who are in charge of importation, wholesaling and retailing. Thus, when one of these major narcotics conspiracies is brought to trial, the number of defendants is usually large and the facts complex.

The character of some of the multi-defendant narcotic trials of importance brought in the federal courts in New York within the last five years illustrates the above quite vividly. In *United States* v. *Stromberg*, *supra*, there were 46 defendants and 16 others charged in a single conspiracy count. Of this number, 19 were tried together. The trial court directed a verdict of acquittal as to one, the jury convicted 18. On appeal, this court examined the record to determine whether there was sufficient independent evidence to sustain the conviction of each defendant. As to three defendants, this court found the evidence too slight to have been submitted to the jury and reversed and remanded with directions to dismiss. The "mass trial" arguments were rejected, the court finding that "nothing

in the issues, the evidence or the rulings warrants a conclusion that the number of defendants prevented the jury from appraising the independent evidence against each defendant and meting out individual justice under the law." 268 F. 2d at 624.

In *United States* v. *Aviles*, *supra*, 37 defendants and 14 co-conspirators were named in the indictment. 17 stood trial, one was acquitted by the court, one by the jury, and the balance were convicted. Again, this court reviewed the record to determine whether there was sufficient evidence of knowing participation of each defendant in the conspiracy to warrant submission of the case as to him to the jury. As to one defendant, the court held that there was no such evidence and directed dismissal of the indictment as to him. The mass trial argument advanced was rejected and the convictions of 16 defendants were affirmed.

In *United States* v. *Agueci*, *supra*, the indictment contained 30 counts, the first count charged conspiracy, the remaining twenty-nine counts charged various defendants with substantive violations. There were 19 named defendants and 8 co-conspirators. 11 were convicted; 10 appealed. Several appellants contended that although the indictment charged one continuing conspiracy, the proof actually revealed several separate and independent conspiracies and that the prejudicial effect thereof required reversal. However, this court held that, even had there been several conspiracies, they could have been consolidated for trial. Furthermore, we said that "the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal." 310 F. 2d at 827.

In each of those cases, some defendants had to sit through a lengthy trial after all the evidence relating to them had been introduced or had to patiently await the

evidence that implicated them. This is inherent in the very nature of the case being tried. The courts have long recognized that narcotics conspiracies require a functional division of labor. A pusher may be the subject of the testimony of a single witness who might be called on the first or last day of trial. So, too, the "executive" has to sit through testimony relating only to minor sales about which he may know nothing. This has never been considered by this court to be so prejudicial as to require severance or reversal by an appellate court when severance was refused. This prejudice, if it be such, would also exist if the jury found the defendants not guilty on the conspiracy count but guilty on substantive counts.

Struzzieri, Monastersky and Bentvena contend, and the majority agree, that evidence, particularly hearsay evidence, was admitted under the conspiracy count and that the court failed to adequately instruct the jury that such evidence could not be used to convict under the substantive counts. Appellants point to Cotroni's statement that the Orlandino "junk" was his; to McGovern's statement that Struzzieri and Bentvena were his delivery boys; and to an entry in a telephone book belonging to Orlandino containing the name "Ang. Tumanaro", an address and a phone number. The validity of these contentions can be resolved only from the charge itself.

The court dealt with each count separately and instructed the jury that each count of the indictment must be considered separately and that the guilt or innocence of each defendant referred to in that count must be determined separately. After Count 4 (Struzzieri and Monastersky) was read in its entirety, the court summarized the evidence to be considered by the jury in deciding whether the defendants charged therein were guilty or innocent.

The summary of proof necessary for "The government, to establish the first essential element against Struzzieri and Monastersky" encompassed primarily the testimony of two narcotics agents concerning the events of January 5 and 6, 1959, including the meeting with Monastersky and McGovern, the order from the Agent to Monastersky for one-half kilo for $6,000, Struzzieri's carrying the package and payment and delivery. The defense testimony was also summarized. Struzzieri, testifying in his own defense, claimed the package contained a shirt, not heroin. Monastersky also testified that the discussions with the agents related to the organization of a crap and blackjack game and that the cash was the amount the agent had available to invest in the game. No reference was made to any of the facts (later summarized by the court in dealing with count 8 and developed largely through the witness Smith who did not testify as to any of the facts involved in the substantive counts) upon which the conspiracy was based or to the "delivery boy" hearsay by McGovern or to the Cotroni, Orlandino hearsay. In short, the evidence controlling guilt or innocence under this substantive count was limited to the events actually observed or clearly admissible conversations.

The court's summary as to Count 5 was also limited to the events of January 13, 1959, and covered the testimony of three agents who described the order to Monastersky for another half kilo at $6,000, the activities of Bentvena, Struzzieri and McGovern, and the delivery of, and payment for, the heroin. Struzzieri, testifying in his own defense, claimed that the package which Bentvena took out of a car contained betting slips, not heroin. No conspiracy proof was mentioned as applying to this count.

Although there was no direct evidence that Monastersky had actual physical possession of the packages involved in

the transactions of January 6 and 13, there is ample evidence upon which a conclusion of constructive possession or control can be based. Similarly as to Struzzieri, he may not have physically handled the package on January 13, 1959, but the proof was sufficient to warrant a finding of constructive possession or control.

The court's instructions to the jury properly defined the elements entering into constructive possession and control, and related them to the actual proof presented. The court adverted to no testimony as to events subsequent to the middle of January, 1959, or which were developed as part of the proof introduced to establish the conspiracy.

In contrast to the evidence summarized as to the specific sales of January 6th and 13th, 1959 (the substantive counts), the court's treatment of the conspiracy count was entirely different. After count 8 had been read, the court separately reviewed the conspiracy testimony, commencing with the Montreal meeting in April or May, 1957, attended by many of the defendants and including the various importations from Canada to New York and the distribution of the heroin to the several outlets in New York and Brooklyn. Only to connect Monastersky, Struzzieri and Bentvena to the conspiracy were the hearsay "delivery boys" and "Cotroni" conversations referred to. Thus, the court was diligent in keeping the many items of proof confined to the counts to which they related.

The fear expressed by these three appellants that the jury, in convicting them on the substantive counts, may have been influenced by proof tendered to establish the conspiracy count is belied by the jury deliberation itself.

Soon after the jury began its deliberations, they requested that the testimony regarding the Bentvena-Struzzieri-Monastersky sales of narcotics be read, along with the instructions on these substantive counts. Also requested

were all the exhibits on the first substantive count, count 4, and an index of all exhibits received in evidence. The jury was brought in and asked to be more specific on the first three of these requests. A few minutes later the jury returned a note specifying those parts of Agent Giorgio's testimony regarding the January 6, 1959, transaction that were desired. Shortly after this testimony was read, the exhibits on count 5 were requested. Further requests by the jury related only to the conspiracy count. It seems clear that the jury, during its five days of deliberation, considered each count separately and, in considering the substantive counts, used only the evidence that had been marshalled by the judge in his charge on the substantive counts. As noted above, none of the hearsay declarations were included in this summary.

Despite the instructions given, the careful marshaling of the evidence, and the jury deliberations, the majority "cannot feel confident" that the hearsay declarations did not contribute to the convictions on the substantive counts. Again, I must voice my view that this is simply unrealistic. The error which causes reversal of the conspiracy convictions of these three appellants was the failure to connect them to the conspiracy except through evidence we now hold to have been inadmissible. But this evidence did not relate to the substantive counts in any manner whatsoever. This my colleagues virtually concede in saying, "The week of proof at the beginning of the trial relating to these three was practically the only reference to them. Thereafter, the trial was solely concerned with proof of guilt in the conspiracy." From this they conclude that "no prejudice to the other defendants resulted from their trial with the three substantive-count defendants", the reason given being that "It is unlikely that this would confuse jury deliberations." However, if the jury were not confused by the

separate conspiracy phase, why would it have been prejudicially confused by the equally separate substantive phase.

If the possibility of confusion is to be our concern, it would be well to consider the confusion that will now surround prosecutors and trial judges as a result of the majority decision. Consider some of the possibilities inherent in the usual multi-defendant narcotics trial. Somewhere amongst the defendants will be one or more who, the prosecutor charges, have actually made sales of narcotics and who are also part of the conspiracy. If the jury acquits them on the conspiracy count but convicts on the substantive count, how can any appellate court "feel confident" that hearsay evidence received solely on the conspiracy count might not have been a prejudicial factor in the conviction on the substantive count. The same situation is presented if tainted evidence is received on the substantive counts and the jury brings in a verdict of guilt only on the conspiracy count. The same will be true, if only substantive counts are charged and evidence is erroneously admitted as to one count on which the jury finds the defendant not guilty. There can be no logical distinction drawn between these situations and the situation before us where an appellate court, instead of a trial judge or a jury, finds that conviction on one count, as to which tainted evidence was received, was not warranted. Upon appellate review how can we ever "feel confident" that a jury in convicting did not rely upon some answer given before objection taken and subsequently stricken or upon something said by court or counsel despite instructions to ignore such remarks. Any argument to the effect that such a possibility is less likely when the jury brings in a verdict of not guilty on the unproven count because the jury probably discredited such evidence or because such evidence was not related to the other counts is pure speculation. The

jury may have fully credited such evidence but found that guilt was not proved beyond a reasonable doubt.

If a feeling of confidence is to be our standard, we should forbid the joinder of counts in one indictment. Appellate courts have never found this course necessary, however, because they have followed the rule that testimony related to counts on which there was an acquittal is not harmful even if it was improperly admitted at trial. Thus, courts have consistently held that if there was sufficient evidence to support conviction on one count, errors relating to other counts will not be reviewed if the sentences are to run concurrently. See, *e.g.*, *Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *Sinclair* v. *United States*, 279 U. S. 263, 299 (1929); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Pinkerton* v. *United States*, 328 U. S. 640 (1946); *United States* v. *Mont*, 306 F. 2d 412 (2d Cir. 1962); *Blassingame* v. *United States*, 254 F. 2d 309 (9th Cir. 1958); *Thomas* v. *United States*, 211 F. 2d 45 (D. C. Cir.), cert. denied, 347 U. S. 969 (1954); *Miranda* v. *United States*, 196 F. 2d 408 (9th Cir.) cert. denied, 344 U. S. 842 (1952); *Gibson* v. *United States*, 149 F. 2d 381 (D. C. Cir., cert. denied, 326 U. S. 724 (1945). And this has been the practice even when an appellant contended that there was insufficient evidence to convict him on a conspiracy count if the court found that his substantive conviction was warranted by the record. See *United States* v. *Iannelli*, *supra*; *United States* v. *Cardillo*, 2d Cir. April 24, 1963.

I feel that in cases where the conspiracy count is dismissed at the close of the prosecution's case by the trial judge, or where the jury returns a verdict of not guilty on the conspiracy count, or where an appellate court reverses a conviction on the conspiracy count, we should follow the standards applied by Judge Medina in *United States* v. *Schaffer*, 266 F. 2d 435 (2d Cir.), aff'd, 362 U. S.

511 (1959). There it was found that no prejudice existed, first, because instructions were given on every offer of proof that evidence admitted with respect to one defendant was not to be considered with respect to any other defendant. Second, the witnesses were called in orderly fashion so that each group of witnesses focused on a separate defendant. Third, the court's charge carefully reviewed the evidence pro and con with respect to each defendant, and an admonition was given to keep the charges separate and to consider the evidence against each defendant separately. Each of these safeguards against adverse prejudice is satisfied here. In addition, the court charged the jury in the exact language approved by the Supreme Court in *Blumenthal* v. *United States*, 332 U. S. 539, 559-60 (1947), namely, that "the guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone." Thus, in view of the more than adequate evidence of guilt on the substantive counts, I would affirm those convictions.

The other appellants also seek to take advantage of this joinder, claiming prejudice by being tried with the Orlandino phase defendants. This effort must fail, however, because all of the evidence introduced at trial was properly admissible against these appellants. There was sufficient independent evidence to link these appellants to Cotroni as members of the same conspiracy. The Cotroni statements to Smith and Biase concerning Orlandino were thus binding on these appellants and were sufficient to make the Orlandino phase defendants their co-conspirators in one overall conspiracy. The fact that there was insufficient independent evidence to make the Cotroni statements binding on the Orlandino phase defendants does not change this result. The situation presented is that the Government

proved the existence of one overall conspiracy but failed to present sufficient independent evidence to make the Cotroni statements admissible against Bentvena, Monastersky and Struzzieri. Since they were their co-conspirators, the other appellants cannot claim error in the introduction of evidence relating to the Orlandino phase defendants, or prejudice in being tried with them.

We wish to express our special thanks and gratitude to Constantine N. Katsoris, Esq., and William R. Luney, Esq., who acted as assigned counsel, both at trial and on appeal, and to Richard V. Giordano, Esq., who acted as assigned counsel on appeal. The trial of this case was long and arduous and preparation of the appeal required the reading of the 25,000 page record of both trials. The devotion and skill demonstrated by these attorneys casts credit upon them. Their briefs and oral arguments conformed to the highest standards of the profession.

The convictions of Bentvena, Monastersky and Struzzieri on the substantive and conspiracy counts are reversed, and the substantive counts are remanded for a new trial; the conviction of Salvatore Panico on the conspiracy count is reversed and remanded for a new trial; the convictions of all other appellants are affirmed.

SMITH, *Circuit Judge*, with whom HAYS, *Circuit Judge*, joins, concurring in part:

Judge Hays and I agree with the careful and exhaustive opinion of our brother Moore except in one respect, the affirmance of the convictions on the substantive counts, 4 and 5.

The trial of Bentvena, Struzzieri and Monastersky together with those indicted and tried only for conspiracy under the circumstances here portrayed, we feel constituted

prejudicial error as to them. The proof of their participation in the transactions alleged in the substantive counts was presented at the start of the government's case. Thereafter, they and the jury were forced to sit through months of testimony establishing the conspiracy, none of which related to the substantive accusations. We cannot feel confident that the admission of this evidence against them, when it was legally inadmissible unless they were shown to be part of the conspiracy, did not contribute to their convictions on the substantive counts by blackening them with the general guilt. See *Schaffer* v. *United States*, 362 U. S. 519, 523 (1960) (dissenting opinion).

This is not a case like *Schaffer* v. *United States*, *supra*; or *United States* v. *Manfredi*, 275 F. 2d 588 (2 Cir. 1960), in which the dismissal of a conspiracy count as to less than all defendants during trial was held not to prevent submission to the jury of substantive counts against these defendants. (It may be noted that even in *Schaffer* four judges dissented.) Proper cautionary instructions there can presumably limit the prejudicial effect of the evidence presented at the trial directed towards proof of the conspiracy. Indeed, one might speculate that a jury would scrutinize evidence of substantive guilt with greater than ordinary care once apprised of the fact that the government had failed to prove its conspiracy case against a particular defendant. But in the case at bar there were no limiting instructions to disregard evidence concerning these defendants. All counts were submitted to the jury, which found defendants guilty of conspiracy on evidence that we have unanimously held to be legally insufficient, and then considered the mass of hearsay declarations of purported co-conspirators against them. There appears to us far greater likelihood of prejudice here than in a case where the jury has weighed the evidence of conspiracy and

found it wanting, or where the Court has so found and warned the jury to disregard it.

Particular evidence of prejudice can readily be found. Struzzieri and Monastersky both took the stand and denied dealing in narcotics. Though admitting their physical presence in the area and certain details as to their physical movements, they claimed that their activities and those of Bentvena related to gambling transactions. Struzzieri's testimony to fourteen or fifteen bookmaking arrests (supported by police testimony) lends a certain wry corroboration to his story. Both Bentvena and Struzzieri were brothers-in-law of the severed defendant McGovern, who figured prominently in the alleged substantive violations. The package wrapped in Christmas paper was said to be a present to him. From these and other details, the three sought to explain the activities in which they were observed, on some basis other than dealing in narcotics. We may be skeptical; but it is not our primary function to appraise this evidence. The jury charged with that duty could hardly have given their defense the same consideration after they were erroneously found to be narcotics conspirators as it would have had they been tried on the substantive counts alone. The mass of conspiracy evidence militated against their credibility and towards their guilt.

Nor do we overlook the general prejudice that results to unrelated defendants who are tried in a mass conspiracy trial. We need but quote *Kotteakos* v. *United States*, 328 U. S. 750, 772-73 (1946):

> "Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large

numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition, and call for the use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift towards totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

However, we find that no prejudice to the other defendants resulted from their trial with the three substantive-count defendants. The week of proof at the beginning of the trial relating to these three was practically the only reference to them. Thereafter, the trial was solely concerned with proof of guilt in the conspiracy. It is unlikely that this would confuse jury deliberations. Moreover, all of the direct evidence of their participation in the conspiracy was properly admitted against the conspiracy defendants. These appellants attack so-called "real evi-

dence" (narcotics and paraphernalia) which was admitted—particularly that allegedly purchased from the three which they claim to be inadmissible against the conspiracy defendants on the record before us. Once they were linked to the conspiracy by independent evidence this appears properly admissible against them. Moreover, this was of itself of no particular force to prove participation in the conspiracy by any individual. It was merely duplicative of other like evidence seized from co-conspirators which was properly admitted. Even if there were error in the admission of any of this evidence we could not hold it prejudicial.

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Cr. 436

UNITED STATES OF AMERICA,

against

WILLIAM BENTVENA, et al.,

Defendants.

Appearances:

MORTON S. ROBSON, United States Attorney, Southern District of New York, Attorney for United States of America; WILLIAM M. TENDY, PAUL J. CURRAN, JONATHAN L. ROSNER, Assistant United States Attorneys, Of Counsel.

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ANTHONY F. MARRA, Legal Aid Society, Attorney for Defendant Carmine Polizzano, United States Court House, Foley Square, New York, N. Y.; GERARD G. BETZ, Of Counsel.

GEORGE R. SOMMER, Attorney for Defendant Joseph Vecchio, 17 Academy Street, Newark, New Jersey.

Opinion of the District Court

LEVET, *D. J.*:

On March 3, 1961, Mr. Thomas Wadden, counsel for the defendant Carmine Galante, moved for a dismissal of the Eighth Count of the indictment in this case, namely, the conspiracy count, or, in the alternative, for a mistrial. He further moved in the alternative "to strike all of Smith's testimony" relating to the defendant Galante (9688). Mr. Oliver C. Biddle, on this same date, moved on behalf of the defendants Petillo, Monastersky, Carmine and Salvatore Panico for a mistrial, or, in the alternative, for a severance "on the ground that the evidence adduced on the voir dire examinations as to wiretap establishes prima facie that a considerable quantum of the proof in this case is tainted in that it was obtained as the result of illegal wiretaps" (9689). These motions were subsequently adopted on behalf of other defendants; the court has therefore viewed said motions as being made by *all* the defendants, and inuring to their benefit (see 9689-9692; see also 9836-9854). Decision on these motions was reserved at the time by the court in view of the fact that certain aspects of the voir dire hearings on wiretapping had not yet been completed.

On February 10, 1961, former federal narcotics agent William A. Rowan testified that in December 1959, during the course of his investigation of the case now on trial, he sat at a wiretap plant (later identified as plant 11) being operated by the New York City Police Department in midtown Manhattan which involved certain of the present defendants (6837-39; see also 6844, 6849-6850, 6862, 6879, 6884, 7027). According to Rowan's testimony, other federal narcotics agents were also present at this wiretap plant during the period of its operation (6850-52).

As a result of this testimony, the court conducted extensive voir dire hearings into the matter in order to ascertain the extent of any utilization of possible wiretap evidence by the government with respect to the prosecution of the instant case. Rowan's testimony, in effect, presaged a long procession of federal agents, New York City police officials, and members of other law enforcement agencies who appeared in court and were interrogated regarding any possible wiretapping activities affecting the defendants.

Hearings were accordingly held on February 10, 14, 15, 16, 17, 20, 23, 24, 27, 28, and March 1, 2, 3, 6, 7, 8, 9, 10, 13, 16. Most of them consumed the greater part of the court's day; in order to expedite the inquiry, evening sessions were rendered necessary on several occasions. The minutes reflect the expansive character of the hearings, a total of over 2,764 pages of testimony relating to wiretap hearings. Perhaps the court may have been unduly liberal in permitting a prolonged inquiry by the defendants into certain areas where futile and fruitless results were apparent from the outset. However, the court was persuaded to allow the defendants to proceed nonetheless by the belief that defense counsel should be afforded adequate and ample opportunity to produce any relevant and material evidence vital to the court's ultimate determination as to whether any leads obtained by the government, directly or indirectly, from such wiretap sources played a part in the prosecution of the case on trial. Numerous subpoenas were served by the defendants on several law enforcement agencies seeking to inquire whether the persons, locations and telephone numbers listed therein had been subjected to wiretapping.

Opinion of the District Court

The court has carefully scrutinized the minutes of the wiretap voir dire hearings in order to be able to evaluate more accurately the defendants' contentions. It has summarized and digested the great mass of testimony relating to the various wiretap operations found to have existed within recent years and affecting certain defendants. It would perhaps prove helpful to set forth the salient facts elicited in the course of the hearings which have guided the court in its consideration and determination of the defendants' motions.

WIRETAP PLANTS 10 AND 11

Testifying on February 17 and 20, 1961, Deputy Chief Inspector John J. Bradt of the Central Intelligence Bureau of the New York City Police Department testified that plants 10 and 11 were opened under his general supervision (7542-43). The plants, authorized by a state court order, were installed on November 10, 1959, and ceased operations sometime in February and March 1960 (7556, 7563-64). Plant 10 was located in the general vicinity of Longfellow Avenue in The Bronx; plant 11 operated from two locations on 47th and 48th Streets, between Fifth and Sixth Avenues, in Manhattan (7544).

According to Bradt, none of the persons named in the instant indictment either as a defendant or co-conspirator was the subject of these wiretap investigations or had any direct relationship to the tapped telephone numbers (7522-23, 7565; see also Pera: 9750, 9462-63, 9759-61; Corrigan: 7190). As a result of the conversations intercepted over these lines, the names of the defendants Galante, DiPietro and Mari were subsequently listed in the wiretap renewal application as known associates of the subject then under investigation by the city police (7560, 7569-70).

The detectives in charge of plants 10 and 11, Detectives Michael J. Lynch, Joseph Corrigan, Thomas O'Brien and Cyril Jordan, reported directly to Bradt; copies of the transcripts of the recorded phone conversations at the plants were submitted to and read by Bradt (7522, 7544). Bradt stated that none of these wiretap transcripts was ever turned over to the Federal Bureau of Narcotics or the United States Attorney's Office (7559).

Bradt initially sought background material concerning the subject under investigation from the Federal Bureau of Narcotics, but he testified that at no time did federal authorities ask him for information concerning any of the defendants now on trial (7591).

Bradt recalled conversations with federal narcotics agent Martin Pera between November 1959 and February 1960 relating to possible federal assistance in the city police's investigation of its subject (7609-10). Bradt testified he sent no written reports to the federal authorities composed entirely or in part from wiretap information, nor did he specifically refer to any wiretap transcripts concerning the present defendants when he exchanged information with the Federal Narcotics Bureau, except for an intercepted conversation dealing with a person termed the "Irishman" (7547-48). Somewhere around January 1960, Bradt inquired if Pera could identify a person called the "Irishman," since a tapped telephone conversation indicated that such an individual was in danger (7526-29). Pera informed Bradt that this descriptive term bore no particular immediate significance (7531). (According to O'Brien's testimony, the "Irishman" episode occurred in November 1959. See 7732-35.)

Bradt admitted that as a result of information obtained from plants 10 and 11, a surveillance of Carmine Galante

was conducted between November 1959 to February 1960 (7533, 7558). Bradt stated he directed Detectives Joseph Corrigan and Thomas O'Brien to meet federal narcotics agents on December 8, 1959 at a location where the subject of the city's investigation had agreed to meet an unknown party (later identified as Carmine Galante) (7578-79). Bradt did not discuss the results of this surveillance with any federal agents (7581-82). According to Bradt, any surveillance assistance rendered by federal agents to his department during the period of the wiretap was purely for identification purposes (7609-10).

In January 1960, Bradt asked Pera whether the Narcotics Bureau had an agent available who could act as an interpreter at plant 11; Pera subsequently assigned agent Cornetta for this specific function (7614-15; see also 7596-97; Pera's testimony; 7808-7809, 7826-28; and the testimony of Defectives Corrigan and O'Brien and agent Cornetta discussed elsewhere).

PLANT 10

There was testimony by Detective Michael J. Lynch of the Central Intelligence Squad of the New York City Police Department that he monitored the telephone wiretap operation designated "plant 10" from November 1959 to sometime in January 1960 (7788-90). Lynch, who worked alone (7790), stated that he did not discuss any wiretap information with federal narcotics agents, nor were any federal agents present when Lynch monitored at plant 10 (7793-94).

According to Lynch, some of the telephone conversations he intercepted at plant 10 were in Italian and were translated at police headquarters by either Detectives Salerno or DeFina (7792). Lynch submitted reports on

the wiretapped conversations to his superiors and admitted discussing plant 10 wiretap information with fellow-Detectives Corrigan, Jordan and O'Brien (7793). Lynch did not put any of the defendants, or for that matter, anyone else, under surveillance as a result of his monitoring.

Lynch's reports and the tape reels of the telephone conversations intercepted at plant 10 were produced in court and made available to defense counsel for inspection and audition (see 7367-7368).

PLANT 11

Detective Cyril Jordan testified that he monitored telephone lines at plant 11 about five or six days a week from November 10, 1959 to December 15, 1959, and from January 15, 1960 to early March 1960 (7627, 7629-31). Jordan saw agents Cornetta, Hunt, Svoboda and Rowan present at plant 11 (7631). Cornetta appeared at plant 11 after January 15, 1960, and was present there around 15 to 18 times over a period of about three weeks (7632-33).

Jordan testified that Cornetta made oral translations at plant 11 of tapped Italian conversations, which were recorded simultaneously with their interception; the reels were taken off the original recording device, placed on another machine and replayed for Cornetta (7634-35, 7675-76). The detectives present wrote down Cornetta's translations (7649-50, 7676). The recorded Italian conversations were replayed at headquarters for the city police's own detective-interpreters who would determine the final translations (7650). Similar testimony concerning Cornetta's presence and functions at plant 11 was given by Detectives Corrigan (7332-7336) and O'Brien (7717-18). See also the testimony of Agent Cornetta (9790-9806) and

Group Leader Pera, (7808-7809, 7826-7828). On one occasion, Agent Changeux was sent by Pera to plant 11 as a translator in Cornetta's place, but Changeux left immediately after he discovered he did not understand the recorded foreign language (Pera: 7833, 7851; O'Brien: 7769; Changeux: 9136-9137).

According to Jordan, he and Detectives Corrigan and O'Brien would attempt tentative identifications of the voices overheard on the tapped lines (7677-79; see also 7665-66). Sometime before January 15, 1960, a voice at plant 11 was tentatively identified by the detectives as that of Carmine Galante (7636-38, 7640-42, 7644). Tentative identifications were also subsequently made of certain voices as belonging to the defendants DiPietro and Mari (7665-66).

Jordan did not conduct any surveillance of any of the present defendants as a result of wiretap information obtained from plant 11 (7652-53). He discussed the December 8, 1959 surveillance of Galante with Corrigan (7654).

Jordan denied discussing any plant 11 wiretap information with federal agent Cornetta or any other federal narcotics agent (7654-55). He testified he did not sit on any other wiretaps concerning any of the persons named in the instant indictment between January 1, 1956 to November 12, 1959. Jordan reported information obtained from plant 11 to his superiors, Inspector Bradt and Lt. James S. Mooney (7659-60).

Group Leader Martin Pera testified that he had numerous conversations with Detectives Corrigan, O'Brien and Jordan during the course of his duties in December 1959 (9453). According to Pera, during this time he received requests for surveillance assistance from the detective on

December 7 or 8, 1959, and at least on 2 or 3 subsequent occasions (9456-57). Pera specifically recalled that he granted the request of December 7 or 8 by sending out federal agents to aid the city police; he could not recall any other December requests that may have been made and honored, although federal agents were sent out for such duties on at least one or two other occasions (9457).

According to the evidence adduced during the voir dire hearings on wiretapping, the following surveillances apparently occurred during the operations of plants 10 and 11 from November 1959 to February and March 1960:

SURVEILLANCE OF DECEMBER 8, 1959

According to the testimony of Detectives O'Brien and Corrigan, an English telephone conversation intercepted at plant 11 on December 7, 1959 indicated that their subject had agreed to meet an unknown person, called "the old man," the next day at 2:30 P. M. at 35th Street and Madison Avenue in Manhattan (O'Brien: 7688-89; Corrigan: 7408-7409). Corrigan notified agent Pera and asked for assistance in a surveillance of this rendezvous (7409; see also Pera: 7810-11, 9454; O'Brien: 7689). Corrigan testified he was "greatly concerned if we could identify either one of those persons" (7409; see also, 7445, 7447-48). Pera testified he did not know at the time who the "old man" was and agreed to send out federal agents to assist the detectives in their surveillance (9461-62, 9454), these agents being Hunt and Rowan (Pera: 7812, 9461-62).

On December 8, 1959, Detectives O'Brien and Corrigan met agents Hunt and Rowan in the vicinity of 35th Street and Madison Avenue (Corrigan: 7409; O'Brien: 7690; Hunt: 9443-44, 9446; Rowan: 7021-22). Around 2:30

P. M., an individual who appeared on the scene was tentatively identified by Rowan as Carmine Galante (Corrigan: 7409, 7455, 7462, 7488, 7743; O'Brien: 7690; Rowan: 7021-22; Hunt: 9147). Galante entered a black Buick automobile driven by a man wearing glasses (O'Brien: 7691; Rowan: 7022).

This automobile was followed by the detectives and the federal agents for several hours (Hunt: 9147; Corrigan: 7409). The man identified as Galante stopped out from the car briefly twice, once to enter a cigar store (O'Brien: 7691; Rowan: 7047-48; Corrigan: 7409). He finally left the Buick auto at 47th Street and Fifth Avenue around 4:00 P. M. (Rowan: 7047-48; Corrigan: 7409; O'Brien: 7691-92), at which point he was followed on foot by Detective Corrigan (Rowan: 7048; O'Brien: 7691-92; Corrigan: 7409, 7455-56). Corrigan testified that he followed the man identified as Galante until 4:45 P. M., when Corrigan eventually lost him in a midtown department store (7409).

There was testimony by agent Rowan (7021) and Detective Corrigan (7459) that no other defendants were observed during this surveillance of December 8th. (See also Hunt: 9624-25, 9651-53.) Pera testified that Rowan reported he had seen Carmine Galante on this occasion (9459, 9462-63). The subject's meeting with Galante was the only significant information Pera could recall was derived from the December 8th surveillance (9463-64). Pera further testified he did not organize any special squad or surveillance team to observe Galante as a result of this surveillance (9762).

OTHER SURVEILLANCES IN DECEMBER 1959

Rowan testified that sometime in December 1959, either agent Changeux or Cornetta informed him at plant 11 of a meeting that had been arranged over the tapped lines (7088; see also 6987). The proposed meeting was to occur at a coffee shop on 33rd or 34th Street and Madison Avenue and apparently involved Carmine Galante (6986-87). Rowan sent federal agents to this location to conduct a surveillance (7088).

No notes or memoranda regarding this incident were made by Rowan; he testified he was unaware of any reports made by his fellow-agents concerning this surveillance, aside from notations that may have been made on their daily reports. (6999).

Detective O'Brien may have been referring to this surveillance when he testified that there was another proposed meeting intercepted on the lines at plant 11 (other than the meetings he observed on December 8, 1959 and January 28, 1960) which was to take place at a coffee shop; but, O'Brien stated he did not cover this meeting or convey his knowledge concerning it to any federal agent (7744-45). (See also the testimony of Detective Corrigan regarding a second surveillance in December 1959 which was conducted only by federal agents, 7479-82.)

SURVEILLANCE OF JANUARY 18, 1960

According to the testimony of agents Hunt and Svoboda, a surveillance of Galante was conducted on January 18, 1960 (Hunt: 9623, 9672, 9676; Svoboda: 9901-9902). Hunt testified that no city police officers participated in this surveillance (9676-9677). It would seem from Svoboda's testimony that Galante was observed at

274 Marcy Avenue, Brooklyn (9902-9903). Svoboda stated that he knew this address was Galante's residence since Svoboda had personally seen Galante at these premises (9902-9903). According to Svoboda, Detective O'Brien may have been present on this occasion (9904).

SURVEILLANCE OF JANUARY 27, 1960

There was testimony by agent Hunt that on January 27, 1960 he, agents, Cornetta, Svoboda, Shammas and LeVee, together with Detective O'Brien, and possibly Corrigan, had Galante under surveillance (9636-37). However, the similarity of the events that transpired during this surveillance to the surveillance described by Detective O'Brien as occurring on January 28, 1960, would seem to indicate that both men were referring to the same surveillance.

Hunt testified that the Galante surveillance of January 27th commenced at 2:15 P. M. and continued until approximately midnight (9647). (See the discussion of the January 28th surveillance of Galante by O'Brien and others, *infra*.)

There was further testimony by Hunt that he resumed his surveillance of Galante the next day, January 28, 1960 (9648-49). Hunt saw Galante at the window of an apartment on Marcy Avenue in Brooklyn; Galante did not leave the premises that day (9649-51). Hunt testified he believed that agents Svoboda, Cornetta, Shammas and Detectives O'Brien and Corrigan were also participants in this surveillance (9650, 9677).

SURVEILLANCE OF JANUARY 28, 1960

Detective O'Brien testified that he took part in a second surveillance resulting from information acquired from plant 11 on January 28, 1960 (7693, 7720). (O'Brien's

testimony concerning this surveillance coincides with a similar surveillance agent Hunt testified he participated in on January 27, 1960 [9636-9647]. It would appear that both men were referring to the same surveillance.) According to O'Brien, he met agents Hunt and Svoboda at 43rd Street and Third Avenue, Manhattan; Corrigan was not present on this occasion (7721).

Galante was observed in this vicinity entering the same 1958 Buick that had been noticed on December 8th (O'Brien: 7722-23; see also Hunt: 9637). As on December 8th, the car was driven by an individual wearing glasses (O'Brien: 7722-23). Hunt identified this driver as one Nicholas Marangella (9637, 9640). Hunt testified that the car made a stop of about twenty minutes at a luncheonette at 32nd Street and Second Avenue (9640-41) and then proceeded to 43rd Street between Lexington and Third Avenues (9644). There Galante got out of the car, met an unidentified man on the street, and went with him into a nearby camera shop (Hunt: 9644; O'Brien: 7724). Detective O'Brien referred to this unidentified person as the "dark one" (7724). About ten minutes later, Galante and the "dark fellow" came out of the store and reentered the Buick (O'Brien: 7724; Hunt: 9645; at this point Hunt temporarily discontinued his surveillance).

Detective O'Brien testified that he followed the car to the vicinity of St. Patrick's Cathedral, where Galante and the "dark fellow" left the Buick and took a taxicab to Schwartz' toy store on Fifth Avenue (7724-26). O'Brien noticed agent Changeux in the vicinity of Schwartz (7726, 7728). Agent Hunt testified that he rejoined the surveillance of Galante at this time and saw Galante enter the toy store at 58th Street and Fifth Avenue (9645-46). From Schwartz', Galante and the "dark fellow" took a

taxicab to 25th Street and Madison Avenue, where Galante dropped off his companion and continued on alone in the cab (Hunt: 9646; O'Brien: 7726). According to O'Brien, agent Hunt thereupon followed the "dark fellow" on foot (7726, 7728). Hunt testified that this individual has never been identified (9644).

Detective O'Brien and agent Svoboda followed Galante and the taxicab from Manhattan to Marcy Avenue, Brooklyn (7726-27). Galante then left the cab and entered the premises at No. 247 (7726-27). Agent Svoboda and Detective O'Brien maintained a surveillance of that address and discontinued their watch after midnight when no one was seen leaving the house (7726-27). O'Brien stated that agent Hunt and another federal agent, perhaps Shammas, may have joined in this latter surveillance (7727).

Surveillance of February 16, 1960

Agent Hunt testified that he last had Galante under surveillance on February 16, 1960 (9625). Agent Cornetta and Detective Cyril Jordan accompanied Hunt on this date (9677). According to Group Leader Pera, the surveillance of Galante in February 1960 was stimulated as a result of other information which had nothing to do with any possible conversations Pera may have had with New York City detectives (9467).

Surveillances in May 1960

Agents Victor Shammas (9906-9909), Frederick Cornetta (9889-9897) and Sidney Svoboda (9898-9901) testified that on May 3, 1960, they conducted a surveillance of the premises at 274 Marcy Avenue, Brooklyn, to ascertain whether Galante still lived at that address, in view of his anticipated arrest under the present indictment. The sur-

veillance continued from about 4:00 P. M. to around midnight. Galante was observed standing by the window of a second floor apartment.

These same agents returned the next day about 4:00-4:30 P. M. They saw Galante leave the house around 8:00-9:00 P. M. and walk toward a nearby elevated station. The agents then discontinued their surveillance however because of Galante's apprehensive attitude.

On May 5, 1960, agent Cornetta resumed the surveillance at 274 Marcy Avenue from 6:00 or 7:00 P. M. to about 3:00-4:00 A. M. When federal agents entered the house to arrest Galante, Galante was not there (9892).

Agents Cornetta and Shannnas stated they made no reports concerning their May surveillances (9893, 9908). Apparently, none of these surveillances resulted in any way from wiretap information (9901, 9908). Agent Svoboda testified that he was aware that Galante resided at 274 Marcy Avenue when he had Galante under surveillance on January 18, 1960 (9901-9902).

Federal Agents Present at Plant 11

Former narcotics agent Jacques L. Changeux, now a United States Customs Agent, testified that he was present at plant 11 for only five minutes (9136-37). Changeux attempted to interpret the foreign language conversation being tapped at the plant, found he didn't understand the language, and left (9136-37). He received no wiretap information from the city detectives monitoring the plant (9140). Changeux also testified regarding certain surveillances he conducted of Carmine Galante (9135-36).

Agent Sidney Svoboda likewise testified that he was present at plant 11 once, about January 18, 1960, and stayed only five minutes (9808-10).

According to Detective O'Brien, federal agent Siragusa briefly visited plant 11 once to see O'Brien, whom he previously knew (7716, 7718-19). This testimony was corroborated by Group Leader Martin Pera who was present at the time (7853-56).

Federal agent James Hunt testified that he visited plant 11 two or three times—once around December 8, 1959, after returning from his initial surveillance of Galante (9143-44) again, two weeks later, to bring a salary check to agent Cornetta at the plant (9145); and on a third occasion sometime in January 1960 (9145-46).

Hunt's testimony concerned surveillances of Galante by federal agents in December 1959 and January and February 1960 (9146-9147, 9483-88, 9623-25). During the December surveillances, Hunt observed Galante frequenting certain midtown Manhattan locations, namely, the Madison Coffee Shop at 33rd Street and Madison Avenue, and a pharmacy at 35th Street and Madison Avenue (9483). After examining certain reports, Hunt recalled specific surveillances of Galante on December 8, 1959; January 18 and 27, 1960, and February 16, 1960 (9611, 9623-25). Hunt testified that he saw none of the present defendants except Galante during the course of his surveillance duties (9624-25, 9651-53). The last surveillance Hunt conducted of Galante was on February 16, 1960 (9625). According to Hunt, Rowan accompanied him only on the December 8th surveillance (9661-63). The witness Smith (also known as "Joe Beard") was not present with Hunt on any surveillances (9653-54).

According to the testimony of Group Leader Martin Pera, no more than three surveillances were conducted in December 1959 by federal agents concerning any of the defendants; these surveillances were primarily of persons

who subsequently led federal agents to Carmine Galante, who was at that time already known to the federal authorities. Some of the surveillances were stimulated by information supplied by Detectives Corrigan, O'Brien or Jordan regarding meetings arranged by their wire-tap subject, and were carried out in the general area of 35th Street and Madison Avenue (7819-21, 9450); other surveillances were stimulated by other sources (9459-60). According to Pera, federal agents observed Galante in this vicinity in December 1959, "two or three [times] perhaps * * * [n]ot more than a half dozen; perhaps two [times]" (7822). Information from the city detectives regarding prospective meetings, and requests for surveillance assistance from Pera terminated at the end of January or early February 1960 at the latest (7826).

Pera was certain that federal agents had attempted surveillances of Galante in October and November 1959, but did not know whether Galante was actually observed during this period (9451, 9468-69). Pera did not recall any March or April 1960 surveillances (9472-73, 9475).

Pera further testified that there was nothing significant whatever in any of the localities to which Galante was followed during his surveillance by federal agents with respect to information necessary to prosecute the present case (9463-64). Galante was known to frequent various vicinities in Manhattan (9464). While the surveillance of December 8, 1959 first revealed that Galante frequented the area of 35th Street and Madison Avenue, Pera stated that "there was nothing at all revealed that was significant in any way regarding any criminal proceedings with regard to [Galante's] * * * being at that particular location" (9466).

Pera testified that there was nothing derived from plant 11 that remotely led to any information uncovered in the case on trial (7848). Pera stated he first saw Carmine Galante in New Jersey in June 1959, when he arrested Galante in connection with another case (9697-99, 9763). At that time, federal agents had observed Galante at 274 Marcy Avenue in Brooklyn on various occasions (9706; see also 9707-9708). The Federal Bureau of Narcotics was also aware of other places frequented by Galante and his business interests in Brooklyn, New Jersey and Montreal, Canada (9699, 9711, 9713-14). Photographs of Galante had been distributed throughout Pera's office in 1957 (9712-13). It was known in 1954, 1955 and 1956 that Galante frequented the Jewelry Exchange on West 47th Street, Manhattan, whose telephone was one of the lines tapped at plant 11 by the city police (9719-20; see also O'Brien's testimony, 7740).

According to Pera, none of the information obtained from the surveillances of December 1959 through February 1960 was utilized by Pera in the case now on trial; he reiterated that the same was true of any information furnished him by the New York City Police (9723-25).

Around September 1959, Pera directed agents Hunt and Svoboda to prepare a composite report on Carmine Galante (9773-74). The report was not prepared as a result of any wiretap information Pera had received (9775); Pera stated that at the time he "knew of no wiretaps with regard to any of the defendants in this case" (9776). Pera also testified that he knew of no background information on Galante or any other defendant that had been obtained through wiretaps (9788).

Furthermore, the record is barren of evidence that any other defendants were subjected to surveillance because of

wiretap information accumulated at plants 10 and 11. (See Rowan: 7006, 7008, 7026; Corrigan: 7459, 7416-17; Hunt: 9624-25, 9651-53.) While certain voices on the tapped lines were identified, albeit tentatively and apparently never definitively, as belonging to the defendants Mari and DiPietro, and the term "Chow" was also overheard, its association with the defendant Mancino being known to some persons present at the taps, evidently no surveillances of these defendants was ever undertaken as a result by the Federal Bureau of Narcotics. (As to Mancino, see Rowan: 7042-43; O'Brien: 7703; Corrigan: 7452-54, 7472-75; Pera: 7839-42, 7844. As to Mari and DiPietro, see O'Brien: 7748-50; Corrigan: 7418-22, 7425, 7427-28; Pera: 7835, 7838, 9736.)

Former agent Rowan, who testified that he was assigned to work exclusively on the case presently on trial from August 8, 1959 until his departure from the Federal Bureau of Narcotics on August 15, 1960 (6892), and thus was perhaps better acquainted with the case's investigative phases than most of the other federal agents, denied that he ever came across any records, notes, or memoranda relating to wiretaps which pertained to this case (7063, 7066-67). Rowan, who appeared as a witness for the defendants in the voir dire, stated that neither he, nor to his personal knowledge, any other federal narcotics agent, utilized wiretap information in any way in the investigation of this case (7103, 7105). (See also Hunt's testimony, 9665-9666.) To quote from the minutes of the hearings:

> "Q. [By Mr. Tendy] Agent Rowan, Government Exhibit 103 for identification, I believe you have testified, was prepared by you as a result of your interviews with Edward Smith.
>
> "A. Correct, sir.

"Q. Is there anything in Government Exhibit 103 which was included in there as a consequence of anything you might have obtained from listening to the wire taps that you have just testified about?

"A. Absolutely not.

"Q. Was there any information which came to you over these wire taps, Mr. Rowan, that was utilized by you in any way in the investigation of this case?

"A. No, sir." (SM 7103)

"Q. Of your own personal knowledge did any agent of the Federal Bureau of Narcotics or any other law-enforcement agency obtain any information from these wire taps concerning this case?

"A. To my personal knowledge, no, sir." (SM 7105)

Moreover, the wiretap recordings themselves taken at plants 10 and 11 and the typewritten transcripts or "logs" thereof were produced and made available respectively for audition and inspection by defense counsel. The state court orders with the supporting city police affidavits authorizing these wiretaps for state purposes were also made available for examination by those attorneys for the defendants desirous of seeing them. (See 8758-60.)

The reports relating to wiretap recordings at plants 10 and 11 were made available to defense counsel for examination (7367). Application was made and granted with respect to the hearing of certain reels or records of the tapped telephone conversations without prejudice to applying for the audition of any other reels (7367-68). The requested reels were played in the courtroom for the benefit of defendants and their counsel, the defendants having

agreed that the courtroom be cleared of spectators (7368-72). Counsel for all parties further agreed to have Detective Joseph DeFina of the New York City Police Department act as official interpreter of the Italian portions of the reels that were played (7374). Accordingly, the reels requested by defense counsel were played on Thursday afternoon, February 16, and the greater part of Friday, February 17, pursuant to the above procedure previously agreed to by counsel for all parties (7386, 7391-94, 7398-99, 7401; see also 7292). Counsel for those defendants concerned with the auditioning of the tapes indicated that all their requests had been played (Kleinman: 7400, 7402; Katz: 7407).

The court listened to the playing of the reels of the wiretap recordings from plants 10 and 11 requested by defense counsel and examined the typewritten transcripts of the tapped conversations overheard at these plants. It also heard the testimony of the New York City police officials and federal narcotics agents who were present at plants 10 and 11 and participated in surveillances of certain defendants during the operation of these plants.

In addition to the existence of plants 10 and 11, testimony was further elicited during the voir dire hearings regarding other wiretap operations, affecting certain of the defendants, conducted by the New York City police during the period of the conspiracy alleged in the indictment or immediately prior thereto. A brief discussion of testimony regarding the maintenance and utilization of these taps may be appropriate at this point.

KROLL-LA COMEDIE TAPS—1955

On March 1, 1961, Lieutenant John J. Sullivan of the New York City Police Department indicated to the court that a tap existed in November 1955 on the phones of one Ann Kroll and La Comedie Restaurant (9116-17).

Lt. Ellsworth Monahan testified on March 2, 1961 that he supervised this wiretap operation, which continued until sometime before Christmas 1955 (9374-77). The monitors at this plant included Buckley, Higgins, Gildea, Gulino, Weston, Dugan, Coenen, Gomes, Villafona, Hayes, Willsee and Kelley (9378-79).

According to Monahan, no wiretap information from this plant was transmitted to any federal agents (9379). No information relating to a surveillance of Anthony Mirra, which resulted from the wiretap, was likewise transmitted to any federal authorities (9380-81).

Essentially similar testimony was also given on March 2, 1961 to John J. Buckley of the New York City Police Department Narcotics Bureau (9400-9416) and Detectives James Weston (9417-20), Frank Gulino (9420-26), William P. Higgins (9426-28), James Gildea (9428-30), James Dugan (9430-33), Michael Coenen (9433-39) and Waldemar Gomes (9440-42), who were assigned to this wiretap at various periods during its operation. (See also stipulation as to Detective Villafona at 9616.)

They testified in effect that no federal agents were ever present at this tap; that they did not transmit any information overheard at this plant to any federal agents; that no information concerning surveillances which might have been made by the city police as a result of this tap was turned over to any federal authorities.

Ormento Tap—1955

On March 7, 1961, James P. Caparell of the New York City Police Department testified that the telephone of John Ormento, DEfender 5-1323, was tapped by the District Attorney's Office from January 1955 to January 12, 1956 (9945-46). The tap was monitored by Detectives

Louis Montello, Frank Nostramo, Frank Mansone, Peter DeCastole, a Detective Armstrong, Detective Joseph DiSantis, a Detective Quartararo and Detective Lester Arrow (9948-49). Caparell saw federal narcotics agents Gregory Poulos and Louis Pagani at the wiretap plant from January to May 1955 (9950, 9966). He subsequently saw agent Robert Gaudette there in late January or early February 1955, and requested the presence of agent Angelo Zirlo on one occasion between January and May 1955 (10107-10109).

Caparell transmitted handwritten synopses of the recorded tapped conversations to Assistant District Attorney Edward Murphy (9952). Surveillances of Ormento were conducted in 1955 as a result of the wiretap in which federal agents Poulos and Pagani participated (9955-56). Caparell last had Ormento under surveillance in July or August 1955 (9957-58). Caparell did not communicate with any other federal authorities about the wiretap other than agents Poulos and Pagani (9958). Since January 12, 1956, he has not intercepted any telephone conversations to which Ormento, Mirra or Galante was a party (9964-65).

Caparell testified that he never heard Mirra's name over this tap nor did he conduct any surveillances of Mirra from January 1955 to January 1956 (9985-86). He never saw Ormento or Mirra meet while Ormento was under surveillance (9988). Caparell questioned Mirra after his arrest in 1958, and went to Mirra's apartment, but not because of any information received from wiretaps or from Edward Smith (9990-94).

In September or October 1958, Caparell heard Ormento's voice while listening to a recording of a tapped telephone conversation in his office with Inspector Maguire (10005-10008). The recording came from a wiretap then in opera-

tion on the phone of one George Pape (10041-42, 10044). Other than the 1955 tap on Ormento's phone and this latter recording, Caparell testified he never heard Ormento's voice on any other monitored conversations (10007-10008).

According to Caparell, he heard Ormento's voice on two other different taps in 1955, in addition to the wiretap on the DEfender number (10024-25). Nothing was done as a result of these other taps, and no surveillances of Ormento resulted in which he or any federal officers participated (10025). As far as Caparell knew, no wiretap information from these taps was revealed to the federal authorities (10026, 10043-44).

Caparell stated he never turned over any wiretap information from the DEfender tap to agents Poulos and Pagani, nor did anyone else give them such information in Caparell's presence (10033).

Ormento's arrest in early 1955 resulted from information received over the tap on the DEfender number, but the arrest was for a New York State violation and not for any federal or narcotics infraction. Federal agents were present when Caparell then arrested Ormento, but no federal charges were pressed (10045).

There was testimony by Caparell that the DEfender tap produced nothing of any investigative value after March 1955 (10047).

On March 7, 1961, Detectives Peter DeCastole (10077-81) and Andrew Rahas (10081-83) testified they did not see federal agents Poulos or Pagani at the plant while they were monitoring there. Detectives Louis Montello (10068-75); Frank Nostrand (10084-88) and Frank Manone (10089-93), on the other hand, recalled that Pagani and Poulos were present at the DEfender wiretap.

The testimony of federal agent Gregory Poulos on March 8, 1961 (10145-10207) indicated that Poulos went to the DEfender plant five to seven days a week between January and June 1955 (10147-49). He testified that he visited the plant on his own initiative after learning of its existence from Detective Caparell on January 28 or 29, 1955 (10150, 10163). He made no notes of what he overheard but submitted reports to his supervisor (10150).

During this period, Poulos had Ormento under surveillance from 10 to 15 times from January to April 1955, some of which were stimulated by tapped telephone conversations he overheard (10151-52), namely those of January 28, March 17 and 18, 1955 (10186). Agent Pagani was with Poulos on these three occasions (10201). These surveillances proved inconsequential. (See 10198-10200.) Poulos knows only the defendant Ormento (10151-52); he did not hear the names of any of the other defendants over the tapped line (10155). There was no surveillance of Ormento by Poulos after June 1955 (10159-60), nor did he hear Ormento's voice on any other wiretap (10160-61).

Poulos and Pagani collaborated in submitting reports to their superiors; the reports did not contain the tapped conversations that were overheard (10164-10170, 10181). Poulos made no other reports concerning Ormento's activities during this period, nor were any other reports submitted (10176-77, 10182).

Pagani and Poulos had been investigating Ormento prior to January 28, 1955; their investigation did not result from any wiretap information (10202-10206).

On March 9, 1961, former agent Louis Pagani testified (10532-10553, 10575-10592) that he visited the DEfender wiretap plant some 10 or 12 times subsequent to January 1955, usually staying there about 10 or 15 minutes (10533).

He went of his own accord, usually accompanied by agent Poulos (10534).

Pagani did not take notes of any of the tapped conversations he overheard; he was not qualified to translate the telephone conversations in Sicilian (10537-38). Pagani perhaps reported to agent George Gaffney what he did on surveillance but did not tell Gaffney what he overheard specifically over the wiretap (10540-41). Pagani reported nothing from the wiretap information received except the results of his surveillance (10545). He and Poulos had Ormento under surveillance watch on March 17, 1955, but failed to see him (10543).

Pagani never read the transcripts of the DEfender tap; the only information he obtained from District Attorney Murphy was Ormento's criminal record and those of his associates and some photographs (10548-51). He never discussed with Murphy wiretap information Murphy may have been receiving (10651-53). The Ormento file in the Federal Narcotics Bureau goes back some 20 to 25 years (10650). Pagani initiated an investigation of Ormento in 1954; no other law enforcement officers were involved (10645-46). Pagani learned at the time Ormento's current home address and the descriptions and license numbers of his automobiles (10646). He saw Ormento five or six times in 1954 and utilized Ormento's file in the Bureau for background material (10647).

Pagani ended his investigation of Ormento in June or July 1955; the investigation failed to disclose any federal violations by Ormento (10649-50). According to Pagani's testimony, since June 1955 he has not participated in any interception of Ormento's telephone conversations or heard any wiretap recordings or read any wiretap transcripts (10577-78).

Opinion of the District Court

Retired federal agent Angelo Zurlo testified on March 9, 1961 (10368-10388) that he visited the DEfender plant sometime around February or March 1955 for about half an hour (10369-70). He listened there to a previous recording in Sicilian dialect, which he partially translated, orally, the information from which was never utilized by Zurlo in respect to Ormento or any other defendants (10370-71, 10379-10384). Zurlo did not conduct any surveillances of Ormento between 1955 and the present (10370).

After he was made group chief around March 1955, Zurlo received reports from Pagani and Poulos; after a re-examination of these reports, he stated that "there is a report that there was a surveillance conducted in reference to one of the wiretaps," and that was all (10374). According to Zurlo, there were no other information reports as to Ormento or any other defendant with respect to wiretap information, other than the fact that there was a surveillance (10375).

Zurlo further testified that he did not discuss wiretap information with New York Assistant District Attorney Murphy, nor did Murphy give Zurlo information which Murphy stated, or which Zurlo knew, came from wiretaps (10376-10377). Zurlo did not direct any surveillance after hearing the Sicilian tape recording at the plant, nor did he give agents Poulos or Pagani, who may have been present at the time, any special instructions as a result (10381-85).

At no subsequent time did agents Poulos or Pagani discuss any wiretap information from the DEfender plant with Zurlo (10386). Zurlo did not participate in the investigation of the case now on trial, nor did he transmit any wiretap information acquired from the 1955 DEfender tap to any federal agents working on this case (10387-88).

Federal agent Robert Gaudette testified on March 9, 1961, that he went to the DEfender wiretap plant sometime near the end of January 1955 to get an agent and stayed there only about 15 minutes (10389-90). He did not recall hearing any recorded conversations on tape and made no reports (10390-91).

Gaudette never intercepted any information on the Ormento line or that of any other defendant prior to 1955, nor has he since (10392-93). He did not read or transcribe anything, or hear any taps on the Ormento line replayed (10394). He did not recall any conversations with agents Poulos or Pagani about wiretap information, nor has he read any of their reports concerning information obtained from the Ormento tap in 1955 (10395-10400). He also denied discussing wiretap information with Detective Caparell or seeing any city police transcripts of the Ormento taps (10401).

Gaudette had no part in the investigation of the case presently on trial (10396).

Cleo Cooper Tap—1958

On March 2, 1961, Inspector Maguire testified concerning a wiretap on the phone of one Cleo Cooper which commenced in February 1958 and operated until October 1958. (10207-10350). Detectives Webber, Sullivan, Bugeresta, Keane and Garbedian supervised this tap.

The voices of Ormento and Mirra were heard in some of the telephone conversations intercepted at this tap (10213-15). Reports or transcripts relating to the tapped conversations were submitted daily to Maguire and kept under lock and key in his office.

According to Maguire, no information obtained from this wiretap was divulged or passed on to any federal narcotics

agents. Nor were any records, transcripts or reports concerning this tap furnished to any federal authorities (10217-19). To Maguire's knowledge, no members of his squad discussed the wiretap information with any federal agents (10240). No wiretaps of Mirra or the LaComedie Restaurant resulted from hearing Mirra's name on this tap; nor did any surveillances of Mirra result therefrom (10345-10350). Maguire saw no federal agents at the tap.

The testimony on March 2nd of Weber (10351-10360), Sullivan (10412-10428), Keane (10429-10438), Bugeresta (10439-10447), Garabodian (10448-10454), McDermott (10455-10487) and on March 7 and 8 by James Caparell (9996-10000; 10041-10042; 10061-10063; 10128-10131; 10140-10143) was of similar import.

There was no evidence adduced of any knowledge of, or participation in, the wiretap on Cleo Cooper's phone in 1958 on the part of the federal authorities; nor was there any indication at all that any information obtained from this wiretap was transmitted to federal agents in any way.

MILDRED MARI TAP—1960

Lt. Sullivan testified on February 24, 1961 that a wiretap was obtained by the city police on the telephone number Lyster 3-7639 by a state court order dated April 18, 1960 and continued until August 20, 1960 (8583-8586; see also 8744-8752). That same day, Sgt. Robert McLaughlin of the New York City Police Department Narcotics Squad (8588-8610), testified that he supervised this wiretap and that the tapped phone, listed to one Mildred Mari, was located in the home of the defendant Cosmo, also known as "Carlie," DiPietro (8593-95, 8605). The wiretap plant was monitored by Detectives Renner, Gildea and Catale, and possibly others (8596).

McLaughlin stated that no narcotics information was obtained from the tap (8599). According to his testimony, no information obtained from the tapped phone was ever conveyed or transmitted to any federal agents (8597-8599). Nor were any of the recorded conversations or the transcripts thereof turned over to any federal authorities (8600-8601). McLaughlin saw no federal agents at the wiretap plant, nor did any narcotics agent visit him during the period of this tap (8607-8608).

On February 27, 1961, McLaughlin further testified that the men who worked at the Mari tap were Doyle, O'Brien, Hurley, Gildea, Colbert, Whiteley, Renner, Cahill, Brennan and Catale (8659).

The ensuing testimony of Sgt. John Doyle (8657-8667), Detectives James Gildea (8668-8674), Joseph Colbert (8675-8672 [sic; should be 8681]), Joseph Whiteley (8672-8684), Max Renner (8685-8699), Roy Cahill (8699-8713, 8903-8905), Francis X. Brennan (8713-8719), James O'Brien (8720-8725), James Hurley (8726-8728), and Joseph Catale (8728-8733), who monitored at this plant at one time or another during its operation, indicated that no information from this tap was transmitted or relayed to any federal agents. The city detectives saw no federal agents at the plant, nor did they convey to the federal authorities any information obtained from surveillances of Frank Mari and Carlie DiPietro which may have been conducted as a result of phone conversations intercepted at this plant. (See 8694-8699, 8711.)

On February 28, 1961, Detective William J. Burke, who had installed the wiretap apparatus on ULster 3-7639, testified that at no time did he see federal agents at the plant, nor had he received any wiretap information from the detectives monitoring the plant (8768-8770).

In view of the foregoing testimony, and in the absence of any showing of a participation in, or association with, the Mildred Mari tap by the federal agents, or the transmission of any wiretap information from this source to federal authorities, either directly or indirectly, the court, on February 27, 1961, denied the application of defense counsel for Mari and DiPietro to examine the transcripts of the conversations recorded at the plant (8760-61).

JOHN INDIVIGLIO TAP—1960-1961

Lt. John Sullivan stated on February 28, 1961, that there was a tap by the city police on the phone of one John Indiviglio at 166-31—25th Street in Queens, brother of the defendant Benjamin Indiviglio, authorized by a court order obtained on November 10, 1960, and continued for two months thereafter (8866-8871).

There was testimony by Detective Sergeant Robert J. McLaughlin on this same date that he was aware of the Indiviglio tap and that Detectives William Higgins, Frank Brennan, Paul Short and Joseph Whiteley monitored at this plant (8888-92).

On February 28, Detectives Higgins (8892-98), Brennan (8899-8907) and Short (8907-8922) testified that no federal agents were ever present at this wiretap, nor was any wiretap information obtained from this plant conveyed to any federal authorities. Similar testimony was elicited from Detective Whiteley on March 1, 1961 (9405-9416). Whiteley further testified that no surveillance of Benjamin Indiviglio resulted from the tap (9409).

NEW YORK STATE PAROLE BOARD.

In the course of his trial testimony, former agent, William Rowan testified that in January 1960 he asked questions of the government witness Smith concerning the defendant Petillo which were based upon a parole report Rowan stated he had seen at the New York State Division of Parole (7172-7172-a). In order to determine whether or not any wiretap information had been utilized in the preparation of this parole report, which may have been transmitted to the federal authorities via Rowan, officers of the New York State Parole Board who participated in the parole supervision of David Petillo appeared in court and were duly examined by counsel for the defendants concerned.

Senior Parole Officer John J. McCarthy (8313-8340A; 8525-8562, 11436-11502) testified in substance that he had no information that wiretaps were used in any way in any surveillance of Petillo by the Parole Board. (See 8535, 8551.) McCarthy further testified that prior to his court appearance on March 16, 1961, he did not see or hear any transcriptions or wiretap information concerning the defendants Mirra, Petillo and Fernandez (11471).

Detective Dan Santoro of the New York City Police Department, who was assigned to the State Parole Board in May 1958, testified that he participated in the arrest of Petillo, Mirra and Smith on June 28, 1958. According to Santoro's testimony (10509-10540; 11504-11517), he did not engage in any wiretapping activities during this period, nor was he aware of any wiretap operations in the course of his work concerning any of the present defendants. Santoro testified that no wiretaps were instituted or utilized prior to or during his surveillance of Petillo in May and June 1958.

Similar testimony was also given by other officers connected with the Parole Board's surveillance of Petillo in 1958: Detective Russell Zacka of the Safe and Loft Squad of the New York City Police Department, assigned to the Parole Board in 1958 (10556-10574); Parole Officer Nathan Grant (11547-11552); Parole Officer Frank E. Lawrence (11553-11569); and Sgt. James J. Vinci, also of the New York City Police Department Safe and Loft Squad, assigned to the Parole Board in June 1958 (11572-11581). They all disclaimed any knowledge or utilization of wiretap information involving any of the defendants now on trial.

STATE LIQUOR AUTHORITY

Answering a subpoena duces tecum served by the attorney for the defendant Anthony Mirra, Saul Katz, an attorney for the State Liquor Authority, produced the Authority's files dealing with revocation proceedings against Chick's Showcase, Inc. and the investigative files on La Comedie Restaurant and Johnny's Keyboard. According to the testimony of Mr. Katz on March 10 and 13, 1961 (10668-10710, 10897-10926), these files contained no indication that any information utilized by the Liquor Authority was derived from wiretap sources.

Moreover, at the request of certain of defense counsel (10929-30; 10936), the court examined in camera all the confidential or investigative files produced in court by the State Liquor Authority and also found no evidence of any wiretapping utilized by the Authority with respect to the above-mentioned establishments. Those portions of the files determined to be public records were made available to, and were inspected by, defense counsel. (See 10992-3, 10937.)

In addition, there was testimony by Detective James H. Gibbons of the New York City Police Department (11582-94) and Howard J. Diller, then a federal narcotics agent (11519-11546), who worked together in 1959 with respect to the State Liquor Authority's revocation proceedings against Chickie James' Stable, that they neither utilized, nor were aware of, any wiretap information in the course of their investigation.

On March 16, 1961, at the final conclusion of the wiretap voir dire hearings, the court again inquired of all defense counsel whether any applications were forthcoming in addition to those originally made on March 3rd (11595). None was made. To quote from the record:

> "Mr. Todaro: I think there was a general—we all generally adopted the same motion.
>
> "The Court: All right. Is that all?
>
> "Mr. Krieger: And for the sake of the record, the adoption of these motions takes place as of now.
>
> "The Court: Then there are no other applications, I take it." (11596)

As Mr. Justice Frankfurter stated in Nardone v. United States, 1939, 308 U. S. 338, 341:

> "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wiretapping was unlawfully employed. Once that is established * * * the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

The record is certainly definite and clear as to the latitude with which the defendants were permitted to discharge in adequate fashion the burden pointed out in the Nardone case, supra. The endless parade of witnesses produced during the hearings and the accumulation of over two thousand pages of wiretap voir dire testimony bear mute but effective demonstration of this fact.

In Coplon v. United States, D. C. Cir., 1951, 191 F. 2d 749, 756, cert. denied, 1952, 342 U. S. 926, the Circuit Court of Appeals declared:

> "'Leads' obtained by wiretapping may not be utilized by the prosecution, but the fact that wires were tapped does not vitiate a criminal prosecution if the government can establish to the court's satisfaction that its proof at the trial, had an origin independent of wiretapping."

While the wiretap voir dire did indicate a transmission of some wiretap information from the New York City Police to the Federal Narcotics Bureau, notably with regard to the Ormento tap of 1955 and plants 10 and 11, affecting certain of the defendants, the information thus turned over to the federal authorities must be deemed to be of a limited nature, and, as shown previously, of no significant import in the investigative phase of this particular case. The surveillance of certain defendants by federal agents, which may have been stimulated by the acquisition of wiretap information, must, in the final analysis, be characterized as possessing no substantial value at all to the prosecution of this case.

The court is also mindful of the evidence which has been adduced on the government's direct case: The persons, locations, incidents, and time periods implicated in the

charged conspiracy. It has had the benefit of hearing the testimony of the government witnesses Edward Smith, Patrick Biase and Suzanne Cadeux, upon which the government has relied in proving the existence of a conspiracy. On the basis of all this evidence, therefore, the testimony presented at the trial by the government and during the extensive voir dire hearings, I am compelled to conclude that there has been no indication whatsoever that information "obtained from * * * taps' has * * * led,' directly or indirectly, to the discovery of any of the evidence" which the government has utilized in the prosecution of the case on trial. See United States v. Coplon, 2 Cir., 1950, 185 F. 2d 629, 636, cert. denied, 1952, 342 U. S. 920.

In the absence of any showing of such tainted evidence, this court has no other recourse, consequently, but to deny the defendants' motions.

Submitted herewith as a supplement to this opinion are the court's summaries of the testimony presented during the voir dire hearings on wiretapping.

So ordered.

Dated: New York, N. Y.,
April 4, 1961.

RICHARD H. LEVET,
United States District Judge.

Statutes Involved

United States Constitution

Amendment V

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 21, United States Code

§ 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction,

contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

§ 174. *Same; penalty; evidence.*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Statutes Involved

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

TITLE 47, UNITED STATES CODE

§ 605. *Unauthorized publication or use of communications.*

* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; * * *

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June one thousand nine hundred and sixty-three.

Present:

HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM BENTVENA, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of conviction of

said District Court of appellants Bentvena, Monastersky and Struzzieri as to the substantive and conspiracy counts be and they hereby are reversed, and that the action as to said appellants be and it hereby is remanded for a new trial as to the substantive counts in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the judgment of conviction of appellant Salvatore Panico on the conspiracy count be and it hereby is reversed and that the action be and it hereby is remanded for a new trial in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that the judgments of conviction of all other appellants be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

Office-Supreme Court, U.S.
FILED
NOV 7 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 468

CARMINE GALANTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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JOHN A. VASSALLO,
of Counsel.

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PETITIONER'S REPLY BRIEF

(1) The government's statement of facts seems to have little relevancy to the questions presented. Regrettably, it is also seriously inaccurate and, indeed, frequently contradicted by the very portions of the record on which it purports to rely. Some of the misstatements of fact which more directly pertain to petitioner Galante are discussed below.

(2) The overall justification advanced by the government for the denial of petitioner's elementary rights is the argument that some of the defendants, not otherwise identified or identifiable, engaged in a concerted effort to bring the trial to a halt (Gov. Br. 25). Presumably, the activities attributed to Galante by the government are meant to show that he partook in some way in the execution of the scheme. However, the activities on which the government relies are

either innocuous, unsupported by the record or contradicted by it.

On two separate occasions during the trial the two prosecutors called to the trial court's attention that they deemed themselves slandered by remarks of petitioner Galante made outside the hearing of the judge, the court reporter, and the jury (Gov. Br. 16, 20). The purported slanders were denied in each case. It is unfathomable how these slanders, even if deemed established, could possibly have served to abort the trial.

Somewhat more relevant, perhaps, is the government's assertion that petitioner Galante threatened that he would "get" the chief prosecutor (Gov. Br. 21, 26). If proven, such a threat would at least show an intent on the part of petitioner Galante to interfere with the prosecution by intimidating the prosecutor. However, the "threat" is pure fiction. In fact, in the cited portions of the record, he said, in the absence of the jury, the very opposite of what the government's brief claims. The trial judge himself made it abundantly clear that petitioner was merely expressing the hope that he, the judge, would ultimately deal with the prosecutor. It was not unreasonable for petitioner to believe himself the victim of suborned perjury (Pet. 6-7). Even on sentence petitioner naively expressed his hope that someday the prosecutor, stricken by remorse, would plead "guilty" to subornation of perjury before the very judge who presided at trial (11967-68).

(3) The few facts which the government's brief mentions in connection with the trial court's deprivation of petitioner's right to counsel are also misstated. Just as the opinion below, the government seeks to create the impression that the second trial was delayed because some defendants wilfully failed to hire counsel. As the prosecutor himself made clear, the delay was due, in part, to the government's own choice and, in part, to the inability of the

District Court to find counsel to assign to those defendants who were indigent (10730-31, Pet. 11). In any event, these matters have no bearing on petitioner, since he was not one of the defendants who had difficulty finding counsel.

It is also not true that medical check-ups revealed "nothing wrong" with either Mr. Iannuzzi or Miss Kahn. At the cited (Gov. Br. 21) portion of the record the trial judge merely relates unspecified information that no "objective symptoms" were found. In the very same context, even the trial judge acted on the assumption that there was "something wrong" with Mr. Iannuzzi and Miss Kahn (Pet. 15).

It may be merely misleading to use the active tense in stating that Miss Kahn absented herself from the trial when she was hospitalized, since she was the victim of an accident; the statement that she refused to give up exhibits in her possession is belied by the very portions of the record which the government cites in support (Gov. Br. 21).

The statement that petitioner "Galante instructed his various counsel not to talk with each other or to turn over the [missing] exhibits" (Gov. Br. 21) is equally wide of the mark. The record reference is to a statement by the prosecutor in which he quotes a Deputy Marshal as having overheard a part of one side of a telephone conversation, which the Deputy Marshal thought might have been with Miss Kahn, in which petitioner, who had been remanded, instructed whomever he was talking to, not to turn over to anyone his "personal property." Since the conversation plainly did not refer to the missing exhibits, this vague hearsay hardly establishes that petitioner Galante harbored some *mens rea* concerning them.

If the statement in the government's brief is construed as an admission that Deputy Marshals were in fact listening in on conversations between petitioner and his counsel, a new facet of the question whether petitioner was de-

prived of the effective assistance of counsel is presented. This Court might wish to determine whether such eavesdropping vitiates a prosecution. Cf. *Coplon* v. *United States*, 191 F. 2d 749, cert. denied, 342 U. S. 926; *Washington* v. *Cora*, 382 P. 2d 1019 (Washington, June 30, 1963, not yet officially reported).

The statement (Br. 21) that the court appointed Mr. O'Connor, "whom Galante had earlier consulted", to act as his attorney, is misleading (Pet. 14-6).

(4) The government does not attempt to answer directly questions 5, 6 and 7 (prejudicial conduct of the trial) raised by petitioner Galante; nor is there any dispute that, concerning the pertinent aspects of the decision below, the Second Circuit is in conflict with the Fifth Circuit (Pet. 30-2).

Evidently, the government contends that the questions raised by petitioner Galante are sufficiently answered by arguing that the misconduct of some defendants represented a deliberate scheme to provoke a mistrial (Br. 27) and that some unidentified defendants acted in concert (Br. 25). The government contends that the conclusion that such a scheme was afoot "was virtually irresistible" (Br. 27) and that the trial court actually reached the conclusion that the outbursts which punctuated the trial were part of a concerted effort by some defendants to bring the proceedings to a halt (Br. 25). The trial court made no such finding. Some of the instances adduced by the government to illustrate the operation of the "scheme" seem too feeble to rank as attempts to abort the trial; *e.g.*, uncomplimentary, but hardly inappropriate or untruthful, remarks of a defense counsel about the government's main witness, or the request of a co-defendant to attend his aunt's funeral (Br. 16). Of course, there is no evidence whatever that there was such a scheme, and some of the events which disrupted the trial are hardly consistent with the notion that petitioner Galante took part in such a scheme.

It is well-nigh absurd to assume that he instigated Salvatore Panico to accuse him falsely of attending the Apalachin meeting (Pet. 20-21) or that the two acted "in concert." Moreover, this Court held that it was error for the trial court to decide summarily that Panico had the capacity to form the requisite criminal intent to be guilty of contempt. *Panico v. United States*, No. 45, October Term, 1962. *A fortiori*, it would be error to find summarily that he had the requisite capacity to act "in concert" with co-defendants to halt the trial, and that such a scheme had been formed outside the court-room, with or without his participation. Nor can there be any conceivable justification for the trial court's observation concerning one of Panico's outbursts that it was "obviously a put up job" (Pet. 19). This observation was made by the trial court in the hearing of the jury and in rejecting a motion for mistrial by another defendant, so that the jury must have received the impression that other defendants had some responsibility for "putting up the job."

Since this Court held that Panico may have lacked the capacity to "put up a job," other defendants were surely entitled not to be charged by the judge with "putting up a job" through Panico. It is plain that the contentions advanced by the government furnish as little justification for upholding the action of the trial court, as does the opinion below.

(5) The government makes no answer to the fourth question (compulsory process for witnesses) presented by petitioner Galante. In answer to questions 1, 2 and 3 (deprivation of right to counsel), the government relies on the opinion below. The petition points out that the only meaningful interpretation of the opinion below, in this context, is that Miss Kahn or Mr. Iannuzzi feigned illness at petitioner's instigation; further, there was no determination of that issue by the trial court; and even if there were, there could be no fair determination without a hearing (Pet. 28-30).

The latter part of this contention is virtually identical with that tendered by Panico's petition for certiorari (Galante Pet. 30). This Court has just held that the "fair administration of Federal criminal justice" required a hearing to determine whether Panico was capable of committing contempt. The trial court had even less opportunity to observe directly whether Miss Kahn and or Mr. Iannuzzi were feigning illness and whether petitioner Galante had instigated the malingering.

(6) In dealing with question 8 the government incorrectly states that it is conceded that Cadieux, as well as Smith, worked for the government for nine months before the wiretap. This is true only of Smith (Pet. 34). In any event, neither mentioned petitioner until long after the wiretap.

(7) The government incorrectly states that Galante has not adopted the questions raised by other petitioners so far as applicable. On the contrary, he has done so (Conclusion, Pet. 35).

(8) Petitioner was fifty-three years old when he was sentenced to twenty years' imprisonment after a trial that could hardly be called fair. Unless this Court intervenes, petitioner is likely to spend the remainder of his life serving a sentence so imposed. The seriousness of the consequences of the conviction emphasizes the importance of the questions presented by this petition.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 468

CARMINE GALANTE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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CARMINE GALANTE,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

The petitioner hereby applies for a rehearing of the order of this Court, dated December 9, 1963, denying his petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, which affirmed his conviction and sentence for conspiring to violate the federal narcotics laws, 21 U. S. C. §§ 173, 174. 375 U. S. 940.* Alternatively, if this petition be denied, petitioner requests this Court to direct that the denial be without prejudice to petitioner duly proceeding in the District Court for a reduction of sentence under Rule 35, F. R. Crim. P.

---

* Mr. Justice Harlan, on application, has twice extended the time for filing this rehearing petition, the second extension being to and including March 4, 1964.

Reasons for Granting Rehearing

I

This petition for rehearing relates to matters of critical concern to the fair administration of federal criminal justice.

This petition for rehearing is directed primarily to matters of record which, while not resolved by the Court of Appeals, are so obvious in nature, so seriously destructive of "the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U. S. 157, 160, that this Court should now take appropriate remedial action. Though these matters were not specifically presented as questions in issue in the petition for certiorari, the circumstances detailed herein reveal that this is one of those "exceptional cases or particular circumstances which will prompt a reviewing or appellate court, *where injustice might otherwise result*, to consider questions of law which were neither pressed nor passed upon by the court . . . below." *Hormel* v. *Helvering*, 312 U. S. 552, 557. (Emphasis added.)*

Indeed, the record is so conclusive as to fact that the testimony of Edward Lawton Smith, the main Government witness against petitioner, was bought and paid for, in violation of 18 U. S. C. § 209, that such testimony may be said to have "poisoned the water in this reservoir." *Hysaroski* v. *United States*, 352 U. S. 1, 14. See also *Communist Party* v. *Subversive Activities Control Board*, 351

* See also *Crawford* v. *United States*, 212 U. S. 183, 194; *Weems* v. *United States*, 217 U. S. 349, 362; *Brasfield* v. *United States*, 272 U. S. 448, 450. Rule 40 (2) of this Court's Rules provides that this Court, "at its option, may notice a plain error not assigned."

Cf. *Lamar* v. *United States*, 241 U. S. 103, 117-118, where this Court considered a constitutional question despite the fact that it had not been raised in the lower courts or even in this Court until the filing of a supplemental brief upon a second request for review. *Alaska Company* v. *Adams*, 370 U. S. 530, 536.

U. S. 115, 124; *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 242.

Moreover, without such purchased testimony, there would be no direct case against this petitioner. This being a federal criminal case, this Court should now exercise its supervisory jurisdiction to insure that the waters of justice are not so polluted, no matter how late in the day the pollution is brought to this Court's attention. *McNabb* v. *United States*, 318 U. S. 332.

Specifically, the issues which prompt this petition for rehearing are threefold:

1. Does the acknowledged payment by the Government of more than $5,000 to the main witness against petitioner, in violation of 18 U. S. C. § 209,* constitute so gross a perversion of federal criminal justice as to warrant corrective action by this Court?

2. Is the Government's intentional and admitted destruction of a Jencks statement in order "[t]o circumvent the Jencks decision", *Jencks* v. *United States*, 353 U. S. 657, equivalent to a failure to comply with an order to produce so as to require the striking of the witness' testimony under subsection (d) of 18 U. S. C. § 3500, even though purported "secondary evidence" of its contents is produced? [This is the "important question of the construction of subsection (d)" of the Jencks Statute left open by this Court in the first *Campbell* case, *Campbell* v. *United States*, 365 U. S. 85, 98. Whether secondary evidence can in any event be permitted, even in the absence of bad faith, was left unresolved in the second *Campbell* case, *Campbell* v. *United States*, 373 U. S. 487, 491, n. 5.]

3. Does this Court's summary reversal of the contempt conviction of petitioner's co-defendant, *Panico* v. *United States*, 375 U. S. (29), as well as other subsequent occurrences, require a reconsideration of the questions presented in the petition for certiorari?

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* Pertinent portions of the statutes involved, namely, 18 U. S. C. §§ 201, 209 and 3500, are reprinted in the appendix hereto, App. 20-21a.

§ 209 was repealed effective January 21, 1963, but is re-enacted, with minor changes, 18 U. S. C. § 201 (d).

Concededly, the first two questions, arising out of uncontested testimony before the trial court,* were not pursued in, or decided by, the Court of Appeals. At the trial, petitioner was represented disjointedly by three different attorneys, none of whom cooperated with the others. On appeal to the Court of Appeals, petitioner was represented by still other counsel, who was not immediately familiar with the record. And in the proceedings before this Court, petitioner was forced to secure other attorneys. The best efforts of the different appellate counsel, unfamiliar with the involved 25,000-page record of a mass conspiracy trial, and unaided by any of the trial counsel, failed to uncover and pursue these two fundamental errors of law. Only the most diligent pursuit of the record over the past few months, following the hasty consideration necessitated by the shortness of the federal criminal appeal periods in the Court of Appeals and in this Court, has permitted the discovery of these errors.

But the duty of an appellate court to notice and correct plain and fundamental errors which reflect upon the honor of federal justice is unaffected by the diligence or negligence of counsel. Whenever such errors are brought to judicial attention, a federal court has no choice but to take corrective action. *See Bartone* v. *United States*, 375 U. S. 52; *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16. Only by correcting the error itself or remanding the case for appropriate corrective action below can this Court be assured that the "untainted administration of justice" has been observed. *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124.

That vacating the judgment below and remanding the case with directions that the Court of Appeals determine the unresolved questions here raised may be an appropriate remedy is illustrated by the recent action of this Court in *Ferguson* v. *United States*, 375 U. S. 962, No. 198, Oct. Term, 1963. In that narcotics conspiracy case, following the grant

* See "Statement of the Case" in the Appendix *infra*. (App. 22-30a.)

of certiorari by this Court, a new question not previously raised was presented in petitioner's brief on the merits. This Court granted the Government's motion to remand the case to the appellate court to resolve the new question and to determine whether reversal was required under the plain error rule. A similar disposition may be dictated by the circumstances here presented.

II

Does the acknowledged payment by the Government of more than $5,000 to the main witness against petitioner, in violation of 18 U. S. C. § 209, constitute so gross a perversion of federal criminal justice as to warrant corrective action by this Court?

This significant question finds an indisputable answer in the facts of record, detailed at greater length in the Appendix, *infra* (App. 23-6a)[*] that the government transacted in unambiguous terms for the purchase of Smith's testimony "in this case" and that Smith agreed to give testimony only after a government agent guaranteed him $5,000 to help alleviate his financial "difficulty".[*] And in that

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[*] Another witness' testimony at the first trial, later recanted, was also given in consideration for promises of money and other favorable treatment (App. 22a). Cadieux and Smith were the only witnesses who "testified against the . . . defendant, Carmine Galante." J. App. 172a.

[*] Unless the context clearly indicates otherwise, references in parentheses are distinguished as follows: to the joint appendix as filed by all appellants in the Court of Appeals, by J. App.; to the appendix to the petition for writ of *certiorari* heretofore filed, by Pet. App.; to the text of that petition, by Pet.; to the appendix to this petition, by App.; to the stenographic minutes of the trial, by plain numeral's without prefix; to a prior trial of the indictment, by F. Tr.; to petitioner's appendix as filed in the Court of Appeals, by "a" numbers without prefix. Where the stenographic minutes of the trial and the prior trial are both referred to in the same parentheses they are separated by use of a semi-colon.

answer lies the corruption of federal justice that demands corrective action by this Court.

At the time of the purchase of Smith's testimony it was a crime to give "any money . . . or any promise or agreement therefor . . . to any person being, or about to be, a witness upon a trial . . . before any court . . . of the United States . . . upon any agreement or understanding that his testimony shall be influenced thereby . . . ." 18 U.S.C. § 209.

That Smith was influenced in giving testimony, and, in fact, to give testimony at all, by the prosecution's promise and payment of large sums of money, is plain. Apparently no thought was ever given to subpoenaing the witness to appear before the Grand Jury or the trial court. Negotiations with him began with an offer of $5,000 "if he would testify". Later, the witness refused to make his initial appearance before the Grand Jury which returned the indictment without the guarantee of an additional $1,500 payment. At the time he gave testimony against petitioner at trial, he had been receiving, for some two years, $300 to $372 a month as a "special employee" of the government. The witness frankly admitted that his receipt of money from the prosecution was one of his "prime considerations" in testifying.* At the first trial, he understood that his testimony could bring "a reward".

The facts of record strongly suggest fabrication of testimony by Smith only for money. Thus the uncontroverted facts show that Smith did not implicate petitioner in the conspiracy charged for months—neither in his first statement to Rowan in January 1960, nor in his Grand Jury testimony in February 1960—during which he spoke of petitioner only as a man known by him to be part owner of a restaurant in Canada. Smith only incriminated petitioner in April, 1960, at the time he was put on a "per diem" by the government as an additional "inducement"

* Later, when confronted with this admission, Smith testified that he didn't recall his "specific words" (66a). He did recall his earlier admission that he understood that his testimony at the first trial could bring "a reward". (67a).

to testify. This, in spite of the fact that from January to April 1960, Rowan showed Smith petitioner's photograph "about twenty times," "as often as [he] carried it." (App. 25-26a)

No case interpreting § 209 has been found. However, federal courts have applied its counterpart statutes (Chapter 11, Title 18, U. S. C.) which prohibit the payment or promise of money to officers of the United States "with intent to influence [their] decision or action . . ." It has been held that criminal intent is established without a showing that the guilty person intended that the person sought to be influenced act unlawfully or wrongfully. *United States* v. *Labovitz*, 251 F. 2d 393, 394 (C. A. 3); *United States* v. *Schaengold*, 159 F. 2d 941, 943 (C. A. 3); *Kemler* v. *United States*, 123 F. 2d 235, 238 (C. A. 1); *Daniels* v. *United States*, 54 F. 2d 339, 343 (C. A. 9), cert. denied sub. nom. *Appell* v. *United States*, 274 U. S. 744.

The reasoning of the First Circuit in *Kemler* v *United States*, *supra*, is often quoted:

> "Obviously no one would give or offer a bribe unless he expected to gain some advantage thereby, and since attempting to gain an advantage by this means is the evil which the statute is designed to prevent, it can make no difference if, after the act is done the doer discovers that for some reason or another, . . . there was actually no occasion for him to have done it."

It would seem, by analogy, that the payment of large sums of money to obtain testimony is a criminal act without proof that the separate crimes of perjury and subornation of perjury were committed. In other words, the prosecution need not have suborned perjury, or intended to suborn perjury, to have committed the unlawful act proscribed by § 209.

For the reasons given by this Court in *Nardone* v. *United States*, 302 U. S. 379, 383-4, a statute like § 209 cannot be interpreted to exempt the acts of federal agents or prosecutors seeking to "build a case" against an accused, or, as

in this case, one merely suspected, and later accused by the testimony of the purchased witness.

The question is squarely presented whether a conviction based upon testimony given, and agreed to be given, only after the promise and payment of large sums of money by the prosecution is obtained by use of the fruit of wrongdoing and is contrary to the decision of this Court in *McNabb v. United States*, 318 U. S. 332.

Analogy may be made to the cases decided in this Court holding inadmissible evidence which is the fruit of an unlawful wiretap proscribed by 47 U. S. C. § 605, e.g. *Nardone v. United States*, 308 U. S. 338.

The Fifth Circuit has held that *McNabb, supra*, compels the reversal of a conviction based upon evidence obtained by the services of a paid informer employed on a contingent fee basis to obtain evidence as to crimes not yet committed. *Williamson v. United States*, 311 F. 2d 441 (C. A. 5). The Fifth Circuit suggests that such an arrangement might cause an informer to induce a suspect to commit a crime which he had no previous purpose to commit. (at p. 444)

The Fifth Circuit rule protects those susceptible to an inducement to commit crime. This Court has held that even the guilty are to be protected where evidence is obtained by governmental action "inconsistent with ethical standards and destructive of personal liberty". *Nardone v. United States*, 302 U. S. 379, 383. If the prosecution's action in this case be countenanced, the completely innocent are denied protection, for they may be sent to the gallows merely by the word of mouth of the person tempted by "make a case" by the promise and payment of large sums of money. In other words, the reasoning of the Fifth Circuit that certain forms of employment of informers create "opportunities for abuse . . . too obvious to require elaboration" is all the more compelling in this case, where the person bribed does not act to obtain independent evi-

* A total of only $300 was paid the informer in *Williamson*.

dence against a suspect, but, rather, secures the suspect's conviction by his own word of mouth.

The argument that petitioner's contention would have this Court hamper the government in the punishment of crime will recall this Court's answer on a prior occasion:

> "The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."

(*Nardone* v. *United States*, 302 U. S. at 383.)

It would seem, consequently, that petitioner's conviction, based upon such purchased testimony, raises an important question in the administration of federal criminal justice. Can a federal court conviction be premised primarily, if not solely, on testimony purchased by the prosecution? In addition, to the extent that an analogy may be drawn to the cases decided under 47 U. S. C. § 605, the affirmance of petitioner's conviction by the Court of Appeals has so far sanctioned a departure from the usual course of proceedings, as to call for an exercise of this Court's power of supervision. To the extent that Smith's testimony was obtained by means analogous to, or as dangerous as, those employed in *Williamson*, petitioner's conviction is in conflict with the decision of another Circuit.

Under these circumstances, corrective action should now be taken by this Court or, at least, the case should be remanded to the Court below for a determination whether the conviction should be reversed for the reasons urged.

III

Is the Government's intentional and admitted destruction of a Jencks statement in order "[t]o circumvent the Jencks decision", *Jencks* v. *United States*, 353 U. S. 657, equivalent to a failure to comply with an order to produce so as to require the striking of the witness' testimony under subsection (d) of 18 U. S. C. § 3500; even though purported "secondary evidence" of its contents is produced?

This question not only poses a problem of utmost significance in the administration of federal justice, but is one necessarily presented by the record in this case. The facts are detailed at greater length in the Appendix, infra (App. 26-30a). A federal narcotics agent, William A. Rowan, conceded on the witness stand that he had destroyed contemporaneous and verbatim notes of his interviews with Smith "so that they would not become available under the Jencks decision." (F. Tr. 6929). Upon petitioner's motion, the trial court held an extended hearing into the matter, resulting in an oral opinion of the court covering 30 transcript pages (1048-9-521) and denying petitioner's motion to strike Smith's testimony under 18 U. S. C. § 3500(d). That opinion, reproduced in the Appendix hereto (App. 1-19a), raises in unavoidable form at least three critical aspects of the Jencks problem:

A. Is an intentional destruction, for improper motives, equivalent to a failure to comply with an order to produce?

With respect to this question, the Solicitor General has already conceded, and this Court has already inferentially held, that the destruction of a prosecution witness' "statements", for the purpose of depriving an accused of the rights accorded to him by this Court and Congress, does give rise to the sanctions provided in subsection (d) of the Statute, at least where secondary evidence of the contents of the destroyed "statement" is not made available

to the accused. Thus, in the first *Campbell* case, *supra*, this Court stated the Solicitor General's concession thusly:

> "The parties argue whether destruction may be regarded as the equivalent of noncompliance with an order to produce under that subsection, [subsection (d)]. The Government contends that only destruction for improper motives or in bad faith should be so regarded." (At 98)

And in *Killian* v. *United States*, 368 U. S. 231, 241, 244, this Court directed that a new trial take place if the District Court should, on remand, find "untrue in any material respect" the Solicitor General's representations that destroyed interview notes, producible under (3500, "... were made only for the purpose of transferring the data thereon to the receipts to be signed by [the witness], and ... destroyed by the agents in good faith and in accord with their normal practice. ..."

It would thus seem that this Court has held, inferentially at least, that the destruction, for improper motives, of a Jencks "statement" requires sanctions, at least where the "statement" destroyed is not available to the defense in secondary form.

In denying petitioner's motion to strike Smith's testimony, the trial court suggested that "subsection (d) on its face has no application in and of itself" where the "government's failure to produce is due to a prior destruction of the statement." (App. 11a) But this suggestion is out of line with the Solicitor General's concession in the first *Campbell* case and this Court's decision in *Killian*. In addition, condemnation of such destruction would appear to have been contemplated by Mr. Justice Brennan, when, in *Palermo* v. *United States*, 360 U. S. 343, he stated:

> "I repeat that Congress made crystal clear its purpose only to check extravagant interpretations of *Jencks* in the lower courts while reaffirming the basic holding that a defendant on trial should be entitled

> to statements helpful in the cross-examination of government witnesses who testify against him. * * * There inheres in an overrigid interpretation and application of the statute the hazard of encouraging a practice of government agents' taking statements in a fashion calculated to insulate them from production." (At 365-6 (separate opinion)).

It would seem that Mr. Justice Brennan's warning should apply to the destruction, as well as taking, of statements with a view toward insulating them from production.

The trial court also stressed that "[a]t most we have what may be interpreted as a tacit acquiescence by Rowan's superiors in the destruction of the notes." (App. 12a) Also, that "[t]he most that was adduced through Rowan's testimony was a responsive silence or tacit acquiescence on the part of his superiors." (App. 7a) No explanation was tendered by the trial court of what possible relevance this finding may have, unless it was felt to be in some way material to his other suggestion, that a federal agent's acts may not be attributable to the prosecution. (App. 12-14a) It seems quite clear that the trial court's suggestion is entirely inconsistent with the government's concession in the first *Campbell* case and this Court's statements in *Killian*. The suggestion would also seem to be offensive to common sense insofar as it is quite plain that agents such as Rowan, although they may not enjoy the stature of a United States Attorney, are the persons whose responsibility and function it is to "develop" a case" and to interview witnesses in so doing. The trial court, in denying petitioner's motion to strike Smith's testimony, sought to find refuge in a new "doctrinal device" contemplated by the late Judge Clark of the Court of Appeals below in his separate opinion in *United States* v. *Cardillo*, 316 F. 2d 606:

> "We seem generally unwilling to upset convictions when the Jencks Act, 18 U. S. C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several

> doctrinal devices have been developed to this end. * * * By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. [Citing cases]. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and *correction must come from the Supreme Court.*" (At 616) (Emphasis added)

It seems to petitioner that the trial court's suggestion is entirely inconsistent with the purposes of the Statute and the decisions of this Court, both in construing the Jencks Act, and in rejecting convictions otherwise obtained by means less than fair.

The trial court also found relevant that the prosecutor delivered to petitioner unrelated documents which he was not obliged to deliver under § 3500, e.g. grand jury minutes. (App. 16a). However, such fact, under similar circumstances, was not said by this court to be in any way relevant to an accused's rights under § 3500. *Rosadilla v. United States*, 360 U. S. 367, 369.

B. Does the production of purported secondary evidence bar the sanctions of § 3500(d)?

This question, which assumes that the preceding question is answered in the affirmative, is that raised but not decided in the second *Campbell* case, *Campbell v. United States*, 373 U. S. 487, 491, n. 5, namely, whether the production of purported "secondary evidence" of the contents of a Jencks statement destroyed in order "[t]o circumvent the Jencks decision" will bar the sanctions of § 3500(d).

In denying petitioner's motion, the trial judge placed most emphasis upon his finding that the Rowan report,

turned over to the defense, was a "substantially accurate reproduction of the [destroyed] notes Rowan had taken during his interviews with Smith." (App. 18a). The trial court, thus, assessed the thought that the Rowan typewritten progress report was probably producible both under (e)(1) and under (e)(2) as a substantially identical copy of contemporaneous verbatim notes. (App. 16a).

The court found Rowan's testimony that he added to his report "things that Smith had not told [him]" and "left things out" that he considered "unimportant" (F. Tr. 6936) an "isolated expression" (App. 4-5a) and concluded that his finding was warranted by Rowan's affirmative answer to the broad question of whether the report contained "the substance of the testimony elicited from Smith." The court ignored other Rowan testimony on the subject." (7719).

Several things are absolutely plain. Rowan destroyed his substantially verbatim and contemporaneous notes of Smith's statements to him about the conspiracy charged. His expressed purpose in so doing was to deny the defense access to those statements as required by law. It is inconceivable that Smith, presented with petitioner's photograph "at least twenty" times during Rowan's interviews of him (App. 25-26a), would not have mentioned petitioner at all in his statement—perhaps only to absolve him of com-

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* The trial court's findings, insofar as based upon his expressed consideration of former agent Rowan as "a defense witness * * * in the second *coram nobis*" (App. 5a) may have been arrived at under the mistaken notion that the hearing conducted pursuant to § 2500 was "an adversary proceeding in the nature of a trial governed by rules governing the allocation between the parties and the burdens of proof and persuasion." *Connelly v. United States*, 365 U. S. 85, 93. If this Court should grant certiorari, but ultimately determine other questions raised against petitioner, it may be shown that this expression on the part of the trial court signals errors in the conduct of the *coram nobis*, which require reversal under the first *Connelly* case, *supra*, in any event. Thus petitioner's counsel was not permitted to "lead" Rowan on cross-examination. F. Tr. 6905-10.

pliçity in the crime charged. One may wonder what other reason Rowan would have to show Smith petitioner's photograph twenty times if it were not the reason that petitioner was absolved of complicity in the crime at the outset, and only incriminated later, after pay. Yet the Rowan report, which was eventually produced for the defense, contained no mention of petitioner. (Di Pietro's Ex. AO in Evidence).

Rowan very clearly testified that in preparing his report with use of Smith's verbatim statements to him, he edited things out and added things to it.* One may question precisely what matter contained in Smith's original statement to Rowan was not contained in Rowan's report. Thus, Rowan admitted on the witness stand that Smith spoke of petitioner only as a man known by him to be part owner of a restaurant in Canada (App. 253a). This did not find its way into Rowan's typed progress report. Presumably, it was one of the things Rowan edited from Smith's statement as "unimportant."

However, even absent such considerations, it seems absolutely clear that the defense was not obliged to rely upon Rowan's editorial skill, especially given his expressed purpose, "[t]o circumvent the Jencks decision." (F. Tr. 7162) A contrary notion seems to petitioner to be absolutely inconsistent with the mandate of this Court in *Jencks*, later reaffirmed by Congress with the enactment of 18 U. S. C. §3500. As was stated by this Court in *Jencks, supra:*

> "Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." (At 667)

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* That he testified in the affirmative when asked the broad question of whether the report contained "substantially" what Smith had told him is not contradictory.

Rowan testified, also, that he made other changes in transcribing his verbatim notes of Smith's statement into his progress report so that "it wouldn't fall under the Jencks decision." (App. 29-30a) Later, Smith did his part "[t]o circumvent the Jencks decision", for he denied ever having seen the Rowan report or ever having made a statement to Rowan. (App. 27a)

The question is presented whether the government's editing of the Smith statement is not that sort of "unilateral determination of the prosecuting arm of the government" already forbidden by this Court, *Palermo* v. *United States*, *supra*, 360-361 (separate opinion).

It seems quite plain that the original statement taken by former agent Rowan would have been ordered to be produced at trial, were it not destroyed. 18 U. S. C. § 3500(c)(2). The trial court correctly observed that the typewritten report might also have been required to be produced under 18 U. S. C. § 3500(c)(1) irrespective of its similarity or lack of similarity to Rowan's verbatim notes of Smith's statement. (App. 10a)

Quite possibly, were both statements made available to petitioner, inconsistencies between them may have effectively been used in the cross-examination of Smith, the main witness against petitioner. But speculation is not required, for this Court has said that an appellate court should not guess what an accused's attorney might have found useful for impeachment purposes in withheld documents to which the accused was entitled. *Rosenberg* v. *United States*, 360 U. S. 367, 371.

C. Is the harmless error rule applicable in these circumstances?

By virtue of his somewhat questionable findings, then, the trial court held, in substance, that the government's bad faith destruction of a Jencks Act statement was "harmless error". The question is presented above whether the "harmless error" principle may properly be applied when documents are not produced under § 3500 because those documents were destroyed with the express purpose of frustrating that Statute.

The question is here presented whether the non-production of "statements" demanded under § 3500 may be "harmless error" where (a) the non-production is caused by an intention to frustrate the Statute, (b) the lower court, in employing the "harmless error" doctrine to deny a motion under subsection (d) of the Statute, was unable to compare the secondary evidence with the "statement" withheld from the accused by reason of its improper destruction, and (c) the witness denied ever having seen the "secondary evidence" and any responsibility for its contents.

Although in *Rosenberg, supra*, this Court has held (four justices dissenting on the facts) that the non-production of documents demanded under § 3500 may be harmless error, in that case there was no suggestion that the government acted with the intention of frustrating the Jencks Statute. Also, there the lower court, whose finding of harmless error was sustained by this Court, was able, by an examination of the withheld statement, to determine whether its contents were imparted to the defense in another form.

This Court has never passed upon a lower court finding of harmless error in the withholding of *Jencks* materials by the prosecution where, as in this case, the lower court was unable to satisfy itself, by actual comparison, that the "statement" withheld was substantially identical to "secondary" materials produced by the prosecution for use by the defense.

In this case, all that the trial court could rely upon in finding harmless error was its subjective impressions of the subjective expressions of the federal agent who testified that he deleted only the "unimportant" from the witness' statement in preparing the secondary document produced for the defense. Presumably, Rowan considered "unimportant" what Smith told him about petitioner, the "twenty times" he was shown petitioner's photograph by Rowan, for petitioner's name is not mentioned in the secondary document i.e. the Rowan typewritten progress report. (App. 25a) The court apparently assumed that the

federal agents addition of matters not told him by the witness was similarly "unimportant."

A resolution of the question presented is important to the fair administration of justice in the federal criminal courts. This Court should grant *certiorari* and decide the question or remand to the Court of Appeals below for decision.

Finally, it should be noted that the federal agents negotiated, with large sums of money, for the purchase of testimony against petitioner after having had their suspicions kindled by the use of unlawful wiretaps. A federal agent then destroyed a "statement" of the witness producible under § 3500, so that it would not be available to petitioner in his attempts to impeach the purchased testimony. When the agent was called to give testimony as to the existence of another *Jencks* statement, strangely absent from all government files, he was sought to be intimidated by other federal agents. (App. 27a) Such conduct by governmental agents falls far below the minimal standards of fairness required in the prosecution of a federal criminal offense.

Congress has underlined the criminality of the prosecution's purchase of Smith's testimony against petitioner by the enactment, in 1962, of 18 U. S. C. § 201(h) which makes criminal lesser conduct.

The suppression of impeachment materials by the federal agent, with the express design of frustrating the mandate of this Court in *Jencks*, is similarly most sub-standard behavior.

The acts of other federal agents in attempting to intimidate their former associate from answering the direction of the trial court to give testimony required by the Jencks Statute (*Palermo v. United States*, 360 U. S. 343, 354-55), is even more shocking.

The ultimate question thus presented is whether the actions of the Government in the prosecution of petitioner are "incompatible with our standards for the administra-

tion of criminal justice in the federal courts, and must therefore be rejected." *Jencks* v. *United States*, *supra*, 668. Viewed in its most favorable light, the activity of the prosecution represented an overzealousness which was violative of the interest of the United States in criminal prosecutions, which interest "... is not that it shall win a case, but that justice shall be done. ..." *Berger* v. *United States*, 295 U. S. 78, 88.

It would be salutary for this Court to grant *certiorari* to review these delictions, or, at least, remand to the Court of Appeals below for a decision in light of the arguments heretofore advanced.

IV

Does this Court's summary reversal of the contempt conviction of petitioner's co-defendant, *Panico* v. *United States*, 375 U. S. 29, as well as other subsequent occurrences require a reconsideration of the questions presented in the petition for certiorari?

Several occurrences since the filing of the petition for writ of certiorari warrant a reconsideration of this Court's denial of that petition.

The questions presented in the petition were cast against a background of the trial judge's impressions, approved by the Court of Appeals and reiterated by the Solicitor General in opposing review, that some of the co-defendants were unduly manipulating their right to counsel and otherwise acting in concert for the purpose of aborting the trial. (Pet. App. 34a, 37a). These impressions were formulated, even as to matters occurring outside the judge's presence, without any semblance of a hearing or inquiry for the purpose of taking or considering evidence on these matters. (Pet. 28-30)

Perhaps the most ill and violently behaved co-defendant was Salvatore Panico. The Court of Appeals below

sustained the trial court's refusal to sever Panico, refusal to order psychiatric examinations at the outset to determine whether he was apt to engage in further conduct prejudicial to his co-defendants, and the denial of motions for the declaration of a mistrial. Panico had invaded the jury box on the very first day of trial, throttling its members and screaming vilifications at them. (Pet. App. 20a) On two other occasions, when remanded to detention headquarters, Panico attempted suicide, both attempts resulting in the delay of trial. (Pet. App. 21-22a) The Court below pointed out the suspicious nature of the suicide attempts. (Pet. App. 22a) On another occasion Panico claimed that he had been drugged and suffered lapse of memory. (Pet. App. 21a) On other occasions he screamed incriminating remarks about co-defendants. (Pet. 19-20)

In ruling that the trial court did not abuse its discretion, the Court of Appeals relied upon its finding on Panico's appeal from his conviction by the trial court of contempt. There it found that the trial court's conclusion ". . . with respect to the deliberate and calculated nature of [Panico's] acts [did not constitute] reversible error." (Pet. App. 24-25a).

However, since the filing of the petition for *certiorari* this Court has reversed the judgment of the Court of Appeals sustaining Panico's contempt conviction based upon his actions above described, on the ground that it was error for the trial court to decide summarily that Panico was not too mentally ill to form the requisite criminal intent to be guilty of contempt. In so doing this Court pointed out that conflicting psychiatric testimony was heard at the first trial on the different question whether Panico was mentally fit to stand trial, and, that since shortly after his contempt conviction, Panico has been confined to a state mental hospital after having been found, by state appointed psychiatrists, to be suffering from schizophrenia. *Panico v. United States*, 375 U. S. 29.

On another occasion, when Panico accused another co-defendant of being a "convicted dope pusher", the trial court observed, in ruling upon a motion for a mistrial, that "It is obviously a put up job." (Pet. App. 28a). Petitioner was accused by Panico of having attended the notorious Apalachin meeting "where they got all the orders for these narcotics pushers."*

It is quite plain, therefore, that both the trial court and the Court of Appeals explained away otherwise reversible error by reference to the trial court's impressions that at least some defendants were acting in concert to abort the trial. It is also quite plain that the trial judge, in formulating that impression, perhaps justified, relied primarily upon his finding that Panico behaved in a way contumacious of the court and was mentally capable of doing same. This Court has ruled that the trial court incorrectly came to that conclusion. It would seem, thus, that a least one prop employed by the trial court and the Court of Appeals in justifying the trial court's actions has been broken. The questions presented in the petition should therefore be reconsidered in light of this new development underscoring the basic premise of the lower courts' feeling that petitioner's procedural rights were fully respected.

At the beginning of the trial, moreover, the trial judge refused to allow petitioner to substitute counsel even though petitioner had other counsel in court ready, willing and able to represent him without delay. The trial court thus saddled petitioner, against his will, with an attorney not chosen by him to represent him. Later, when petitioner's new counsel, who was only allowed by the trial court to be co-counsel, sustained an accident, the lawyer who sought to be relieved at the first day of trial was thrust back into the

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* Although the Court of Appeals below reversed Panico's conviction on the ground that the trial court erred in refusing him the right to testify in his own behalf, it summarily denied petitioner's contention that he could have shown on cross-examination that Panico's Apalachin charge was false.

case although fully unprepared. (Pet. 24-6a) It is quite clear, and the Court of Appeals below points out, that the trial court's actions at the beginning of trial with respect to petitioner's right to substitute counsel, where no delay could be occasioned thereby, can be explained only by the trial judge's impression—now made questionable by the Panico contempt reversal—that Panico and other defendants were manipulating that right with a view to aborting, or at least delaying, the trial. (Pet. App. 32a) The Court of Appeals also observed that on the very first day of trial, "there were three defendants who did not have counsel in court." (Pet. App. 32-3a) Any question of the *bona fides* of the heart illness which required the absence of at least one of those attorneys, Sylvester Consentino, should be removed by the fact that Mr. Consentino, on February 4, 1964, died of a heart attack. (*New York Times*, February 5, 1964).

The trial court's assignment of new counsel to represent petitioner toward the end of trial, with only a day to prepare, was justified by the trial court and by the Court of Appeals below by the fact that the accident which resulted in the absence of petitioner's counsel from trial resulted in no "objective symptoms of injury." (Pet. App. 29, 36a) Petitioner's attorney, who had been crippled by polio in youth, had sustained a fall on a New York City sidewalk, and was hospitalized. (Pet. 10, Reply Brief on Appeal to the Court of Appeals, 15) Her law suit against the City of New York for damages due to that accident is pending in the Supreme Court of the State of New York, Bronx County. (Tort Division, No. 89687, Controller's Number T. 178346) Despite the liberality with which motions for summary judgment are entertained in New York State Courts when sham law suits are brought, no such judgment has been rendered nor for that matter has any been sought by the City of New York. It is quite plain that the actions of the trial court with respect to petitioner's counsel are inexplicable other than by reference to several suspicious happenings at trial. It has been

shown that at least some of the suspicion was unwarranted, or, at least, formulated rashly and without compliance with fair standards of justice.

It is submitted that, on the basis of the occurrences heretofore stated, the questions tendered by petitioner in his petition for *certiorari* should now be reviewed.

Conclusion

For the foregoing reasons, this petition for rehearing should be granted and the order of December 9, 1963, denying certiorari, should be vacated. Plenary review on certiorari should then be ordered or, alternatively, the case remanded to the court below for consideration and decision as to the issues not previously resolved.

Should this petition be denied, however, petitioner requests that the denial be accompanied by an order protecting petitioner's right to proceed for a reduction of sentence under Rule 35, F. R. Crim. P.*

Respectfully submitted,

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Attorney for Petitioner,
1730 K Street, N. W.,
Washington 6, D. C.

JOHN A. VASSALLO,
Of Counsel.

* On January 22, 1964 Mr. Justice Harlan denied petitioner's motion, consented to by the Solicitor General, for an order recalling notification of this Court's denial of his petition for writ of certiorari. The motion was made to obviate the possibility that a motion for reduction of sentence, to be made if this Court acts unfavorably upon this petition, may be considered to be untimely. Mr. Justice Harlan denied petitioner's motion with leave to renew request the alternate relief above sought.

Certificate of Counsel

I, Eugene Gressman, being the attorney for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Eugene Gressman

APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

60 CR. 436

UNITED STATES OF AMERICA,

against

WILLIAM BENTVENA, *et al.*,

Defendants.

LEVIT, D. J.:

This is an opinion and decision on the defendants' motion to strike testimony of the witness Smith.

The defendants have moved to strike the testimony in this case of the Government witness Edward Lawton Smith. This motion is said to be grounded upon subsection (d) of Section 3500, Title 18, United States Code, which provides:

"If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

The defendants contend that the inability of the Government to produce the original handwritten notes of

former narcotics agent William A. Rowan, taken during his interviews with the witness Smith, because of the destruction of said notes by Rowan prior to the commencement of this trial, is equivalent to an election of noncompliance on the part of the Government requiring application of the consequences set forth in subsection (d) above.

The salient facts bearing on the issue presently before the court are as follows:

Earlier in the course of this trial, pursuant to an application by defense counsel, a voir dire examination was held on January 5, 1961, in the absence of the jury, of course, of Federal narcotics agents George Gaffney, Charles Ward, John Dolce and Patrick Biase, who had dealt with Edward Smith during the investigation of the instant case in order to ascertain the existence of any statements, reports or memoranda relating to the testimony of Smith which might fall within the purview of Section 3500, popularly known as the Jencks Act. (See Minutes Nos. 3264 and 65, 3305 and 06, 3048] through 3353.)

During the preliminary examination of former agent William A. Rowan on January 6 and 9, 1961, testimony was elicited to the effect that Rowan had interviewed Smith on several occasions during January and February of 1960 and had taken down notes of the information given by Smith. (See Minutes Nos. 3675, 3677.)

Rowan testified that he ultimately transcribed the contents of his notes into a typewritten report. (See Minutes Nos. 3786 and 3787.)

"The Court: Well, in other words, whatever you had transcribed is merely what you had written down, is that so, without any addition or subtraction, generally speaking, or modification?

"The Witness: I might have put in better verbiage, but substantially what I had been told.

"Q. By Smith?

"A. Yes, sir."

(See Minutes No. 3694.)

As a result of Rowan's testimony, in pursuance to the Court's direction, the Government produced an updated progress report prepared by Rowan which was marked Government 103 for identification. The report was available to defense counsel "as a proper subject of 3500." (See Minutes No. 3740.) Rowan identified 103 as "the substance of the testimony that I had elicited from the witness Smith." (See Minutes No. 3729) and consistently maintained that 103 constituted the sole report or memorandum which he had prepared which embodied the conversations which he had had with Smith regarding the latter's activities in this case. (See Minutes Nos. 3737, 3772, 3773, 3783, 3784.)

"Q. (by Mr. Fuller) Did you have occasion to recite substantially verbatim the conversations you had with Mr. Smith in any report he (sic) ever prepared for the Federal Bureau of Narcotics other than 103?

"A. No, sir."

(See Minutes 3796.)

It was further elicited from Rowan that the report designated 103 was transcribed directly from his handwritten notes. There were no intervening drafts prior to the final report represented by Exhibit 103. (See Minutes Nos. 3798 and 99.)

In view of the discovery of the existence of 103, certain counsel who had already concluded their cross-examination of Smith were permitted to reinterrogate him with regard to 103. The record clearly reflects an extensive and generous utilization by defense counsel of the impeachment opportunities offered by 103 in relation to Smith's trial testimony.

Smith, however, while admitting that he had discussed the facts in this case with Rowan on various occasions denied, during his cross-examination, that he had ever seen Rowan taking down notes during these interviews. (See Minutes Nos. 4449, 4454, 4463 through 69.)

Smith, moreover, testified that he had never seen the report 103 and had never read or corrected it. (See Minutes 4471 through 75.)

This rather sharp and emphatic conflict between Smith's testimony and that of Rowan presents a somewhat anomalous situation. Rowan stated that when he interviewed Smith he noted down the story narrated by Smith, writing at times in the first person and at other times in the third, the ratio being "about fifty-fifty." (See Minutes Nos. 6902 and 03.)

These notes were later transposed into report 103, which was written solely in the third person. (See Minutes No. 6904.)

When questioned by the Court as to why he had employed only the third person in 103 Rowan replied: "So that it wouldn't fall under the Jencks decision." (See Minutes No. 6908.)

We also have Rowan's testimony that he read from his handwritten notes to a stenographer, who typed up the report identified as 103. (See Minutes No. 6932.) In other words, Rowan dictated 103, using his notes.

He further testified that he then compared the typewritten transcription with his notes as follows:

"The Court: How did it appear?

"The Witness: It was what I had in the notes except that it had been changed to the third person in all instances.

"The Court: That was the only difference in substance at least?

"The Witness: That's right, sir." (See Minutes 6933 and 34.)

In short, therefore, in the light of all the credible evidence adduced in this court, principally from the testimony of former agent Rowan, it can be said with reasonable certainty that report 103 reflects substantially verbatim the information Smith had related to Rowan regarding the facts in this case. This court is convinced of the authenticity of 103, and the circumstances surrounding its origin clearly establish a direct and unbroken relation to, and emanation from, Rowan's original notes. The defendants argue, however, that Rowan stated at the end of the second voir dire examination that: "I did make some additions

involving the case, about things that Smith had not told me, and I left things out that, in my opinion, were not important." (See Minutes 6935-36.)

However, this isolated expression must be carefully evaluated and compared with the rest of Rowan's testimony and his consistent reiteration of the authenticity and accuracy of 103, vis-a-vis his original notes. Moreover, if reasonable credence is to be afforded Rowan's testimony, Rowan discussed the final report 103 with Smith and went over the report with the witness to check its accuracy. (See Minutes 3751, 3767-69.)

Consequently, according to Rowan's own testimony, and he was called as a defense witness to testify in the second voir dire, Smith was made aware of the contents of 103, and in confirming the accuracy of its contents, in effect, adopted the report as his own statement.

The original handwritten notes were subsequently destroyed by Rowan after being transcribed into his report. (See Minutes 6904, 6933-34.) Rowan testified at the second voir dire examination in February that he destroyed his notes "so that they would not become available under the Jencks decision." (See Minutes 6929; see also Minutes 7162.) Yet, when interrogated previously during the first voir dire in January about the disposition of these same notes, Rowan then declared: "I destroyed them myself. I was finished with them." (See Minutes 3799.)

He also denied at that time that there had been any directive from his superiors in the Federal Bureau of Narcotics to destroy the notes. (See Minutes 3799.) Rowan subsequently maintained that he destroyed his notes "because it was agreed that I would destroy the notes after I made up the report." (See Minutes 6911.)

According to Rowan, the matter was discussed at a meeting at which his superiors, District Supervisor George Gaffney and Group Leader Martin Pera were present in August or September, 1959. (See Minutes 6911-6912.) However, Rowan was unable to recall exactly what was said by the individuals present at this meeting; he said

that the substance of the discussion was that "I should follow the course that I took in another investigation," the Aviles case. (See Minutes 6920.) (See *United States* v. *Aviles*, 2 Cir., 1960, 274 Fed. 2d 179.)

Rowan stated that he had discussed the destruction of records in the Aviles investigation with certain of his superiors in the Bureau of Narcotics but again was unable to give even the substance of these conversations. (See Minutes 6922-23, 6926-27.)

While there was testimony by Rowan that he had discussed the Jencks statute with his then superiors prior to the procedure he took in the Aviles case, Rowan denied, however, that he had received explicit instructions from anyone to destroy records in the Aviles investigation. (See Minutes 6923.)

The record mirrors the uncertain character of Rowan's testimony pertaining to the sequence of events leading to the destruction of his notes in the instant case, and I quote from the record:

"The Court: . . . Why did you destroy the notes in this case?

"The Witness: So that they would not become available under the Jencks decision.

"Q. Was this destruction done with the knowledge of your superiors?

"The Court: Just a moment. I assume it would have to be some knowledge at the time or prior to the time and not afterwards.

"Mr. Wadden: Yes, sir.

"The Court: Now you may answer.

"The Witness: Yes, sir.

"The Court: What is the answer?

"The Witness: It is, yes, sir.

"The Court: How? Did anybody tell you to destroy records, to destroy notes? Just answer that question.

"The Witness: Again, no, no.

"The Court: Did you tell any of your superiors that you were going to destroy the notes?

"The Witness: Yes, sir.

"The Court: Which one, that you told, that you say you told that you were going to destroy the notes of the Smith interview; do you recall any particular person?

"The Witness: Agent Pera and Mr. Gaffney.

"The Court: Well, when did you tell Pera that you were going to destroy the notes?

"The Witness: I don't recall, sir.

"The Court: What did he say, if anything, when you made some statement to him about it? What did he say?

"The Witness: He just acquiesced to what I told him I was going to do. He didn't say anything.

"The Court: He didn't say anything? You say you told it to Gaffney, too, or anyone else? Did you tell anyone else that you were going to destroy your notes in this Smith matter?

"The Witness: I don't recall, sir."

The Court: After an interruption:

"The Court: Did you tell Gaffney that you were going to destroy your notes on Smith?

"The Witness: Yes, sir.

"The Court: When?

"The Witness: I don't recall, sir.

"The Court: What if anything did he say?

"The Witness: He didn't say anything, sir.

"Q. Did you tell him prior to the time the notes were destroyed?

"A. Yes, sir."

(See Minutes 6930 and 6931.)

Thus, according to Rowan, he notified certain of his superiors in the Narcotics Bureau that he was going to destroy his interview notes on Smith, but the most that was adduced through Rowan's testimony was a responsive silence or tacit acquiescence on the part of his superiors.

Rowan, who had been a Federal narcotics agent since October 8, 1956, was unable to recall one specific occasion during past investigations he had worked on where he had

preserved or kept interview notes. (See Minutes 7109, 7112.)

During his career as a Federal agent, Rowan testified he must have interviewed from fifty to seventy-five witnesses in the course of his duties. (See Minutes 7105-7110.) He would take notes of the information related to him by these witnesses between half to three-quarters of the time. (See Minutes 7108-7110.) These notes would on occasion be transcribed on the Bureau's narcotic form 184. (See Minutes 7111.) At times, Rowan would give his notes to a fellow-agent working with him on the same case who would transcribe the contents of the notes into a report; on other occasions Rowan was himself given notes by other agents which he would transcribe into typewritten reports. (See Minutes 7111.)

As to the customary disposition of these original notes, Rowan testified as follows: "The notes might sit on my desk or I'd destroy them, throw them away after I was finished putting them into the 184's." (See Minutes 7111-7112.) As mentioned above, Rowan could not recall "one specific occasion" when he kept or preserved his notes. (See Minutes 7112.) When queried as to why such notes were ultimately destroyed, Rowan answered: "Well, it wasn't a matter of destruction. I was finished with them at that point and I tore them up and threw them away." (See Minutes 7112.) This past practice conforms with Rowan's original explanation as to why he disposed of the notes in this case: "I destroyed them, myself. I was finished with them." (See Minutes 3799.) When viewed against this background, the pattern of Rowan's conduct becomes more clearly discernible.

While admitting that he was finished with his handwritten notes on Smith and no longer needed them once they had been transcribed into a report, Rowan nevertheless asserted, when called by the defendants during the second voir dire, contrary to his earlier testimony (See Minutes 3799.)—that he destroyed these notes "to circumvent the Jencks decision." (See Minutes 7113-7114, 7162.)

In order to determine the question before it, the Court is compelled to resolve the self-contradictory testimony given at times by Rowan, as well as those conflicting declarations made by Smith. During oral argument on the instant motion, the attorneys for the defendant Salvatore and Carmine Panico argued:

"* * * The statement of Smith that he never saw the report, that he never was interviewed in this case by Rowan is palpably false for Government's Exhibit 103 to a great degree parallels the testimony Smith gave before the grand jury and in this court. This report is not a figment of Rowan's imagination. He could not have described Smith's movements and Smith's implication of the various defendants in this case unless Smith told him about it." (See Minutes 9868.)

Yet, the same counsel later declared:

"* * * In view of Smith's testimony that he never was interviewed by Rowan and Rowan's statement about the wilful destruction of the notes, the typewritten interview report was but a sham and a subterfuge to deceive defense counsel and to contravene Section 3500." (See Minutes 9870.)

It would seem to be the principal contention of the defendants that the destruction of Rowan's handwritten notes thus deprived them "of a mighty weapon of defense." (See Minutes 9869.)

The Government, for its part, maintains that Rowan's testimony clearly establishes that the typewritten report 103 "was in effect in substance what Smith had told him and he took it from his handwritten notes which * * * Rowan took down as best he could everything that Smith told him." (See Minutes 9874.) It argues that there is no indication that Smith ever saw Rowan's handwritten notes or read them. The Government points out that Rowan, while an agent, always destroyed his interview notes in past investigations after he had put them into some form of a report. (See Minutes 9875.) Moreover, it is claimed that any subjective intent on Rowan's part to circumvent

the Jencks Act is essentially immaterial since this intent was in fact frustrated when the report transcribed from these same notes was actually made available to the defendants for impeachment purposes during the cross-examination of Smith.

As a result of the voir dire hearing held on January 6th and 9, 1961, the Government was ordered to produce all reports and memoranda prepared by former Agent Rowan during his investigation of this case. After examining those papers in camera, the Court decided that the only report dealing with Smith's trial testimony which came within the purview of Section 3500 was the undated progress report prepared by Rowan, to wit, Government Exhibit 103 for identification. This Court concluded on the basis of all the credible evidence adduced during the preliminary hearing that Exhibit 103 constituted at least "a substantially verbatim recital of an oral statement" made by Smith to Rowan "recorded contemporaneously with the making of such oral statement." (See 18 USCA § 3500 (e), (2).) Moreover, despite Smith's declarations to the contrary, Rowan's testimony that he went over the report 103 with Smith, if so believed, indicated that 103 might also be "a written statement made" by the witness Smith and "otherwise adopted or approved by him," which would satisfy the requirements of subsection (e) (1) of Section 3500. In any event, the Court ordered the Government to deliver 103 to defense counsel, and this was done.

It would seem that the crucial issue for determination is whether the destruction of whether [sic] Rowan's original notes violates the Jencks Act and thus compels this Court to strike from the record the testimony of the witness Smith. The question necessitates the construction of subsection (d) expressly left open by the Supreme Court in Campbell *v.* United States, decided January 23, 1961, 365 U. S.

Subsection (d) purports to penalize the Government for non-compliance with an order of the Court under paragraph (b) or (c) of Section 3500 to deliver to the defendant any

such statement or such portion thereof as the Court may direct, thus presupposing an election by the Government not to comply with an existing court order. In this case the Government has acceded to, and complied with, all orders of the court requiring production and delivery to the defendants of all documents in the possession of the Government found to be available to the defendants under Section 3500. One may argue whether there can be an election by the Government not to deliver a statement when called upon to produce the same when such statement is not in the Government's possession at the time of the court order. Consequently, it would appear that subsection (d) on its face has no application in and of itself in such a situation. This would appear especially true when the Government's failure and inability to produce is due to a prior destruction of the statement.

However, the defendants charge that the Government, in effect, has made an election not to produce under subsection (d) at the time of the destruction of the notes. (See Minutes 9883.) They contend that the fact that such demandable documents are no longer in the possession of the Government at the time the Court orders their production during the trial is no defense; that a request by defendants for such notes after their destruction is made known would represent a futile gesture. (See Minutes 9883.)

While the statute plainly refers to a "statement * * * of the witness in the possession of the United States," Justice Frankfurter, dissenting in Campbell, did view the majority opinion in that case as implying that a defendant would be entitled to statements which the Government did not possess at the time of the trial. In rejecting this construction, Justice Frankfurter observed:

"* * * Nothing in the legislative history of the Act remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the Government." (354 U. S. at)

See also Senate Report No. 981 of August 15, 1957, accompanying Senate Bill 2377, which Senate Bill was passed as the Jencks Act in lieu of the House Measure in 2 U. S. Code Congressional and Administrative News, 85th Congress, 1st Session, 1957, 1861-1862.

However, as Justice Frankfurter further suggests, another rule may obtain where "documents which are demandable for production under the Jencks Act are no longer in existence, and for * * * a reprehensible reason chargeable to the Government." (365 U. S. at .)

Here we have Rowan's somewhat vague and indefinite testimony concerning the destruction of his notes, and the alleged complicity of his superiors regarding their disposition, in marked contrast to other areas of his testimony. At most we have what may be interpreted as a tacit acquiescence by Rowan's superiors in the destruction of the notes. Rowan himself explicitly disavowed any explicit instructions to destroy them. Yet, according to Rowan's own testimony, in disposing of his notes on Smith, he did therewhat he had always done before with his interview notes. The disposition of the notes concerning Smith is colored however by Rowan's supposed injection of a subjective intent that they be destroyed in order to circumvent the Jencks Act.

Another facet of the problem which presents itself is whether the Department of Justice should be precluded or estopped from utilizing the testimony of Smith in the prosecution of this case because of the actions undertaken by subordinate members of the Federal Bureau of Narcotics in the Treasury Department. No statutes or regulations can be found which authorize a federal narcotics agent to act on behalf of the Department of Justice or preclude, hinder, thwart or otherwise create by his actions an estoppel against the prosecution of a crime against the United States. See 5 U. S. C. A. §§ 282, 282(a); 21 U. S. C. A. §§ 171, 172, 173, 174, establishing the Bureau of Narcotics and defining its functions and scope of authority. See also 5 U. S. C. A. § 291 relative to the establishment of

the Department of Justice, and 5 U. S. C. A. 300 regarding the appointment of officials by the Attorney General for the detection and prosecution of crimes against the United States.

In McDonald *v.* United States, 8 Cir. 1937, 89 F. 2d 128, cert. denied, 1937, 301 U. S. 697, rehearing denied, 1937, 302 U. S. 773, involving an alleged violation of the federal anti-kidnapping act in which marked ransom money had been exchanged for unmarked money, a government witness, acting under orders from his superiors in the Treasury Department caused the marked money to be called in and macerated by the Treasury Department. In affirming the trial court's admission of secondary evidence offered by the government with regard to the macerated money, Circuit Judge Faris wrote:

"* * * While it is to be considered that an unfavorable inference arises in the trial of a lawsuit against a party who destroys primary evidence, the penalties and the odium are personal (22 C. J. 109; 2 Chamberlayne on Evidence, 1078a), and the extreme penalty of refusing to admit secondary evidence, of a fact or facts vital to the prosecution here, ought not to be inflicted because of the bad judgment of a minor official, or a bureau of the government."

And further stated in the same opinion, and I quote:

"* * * Back of the harsh rule contended for by appellant—if indeed this rule has not been outmoded or modified (22 C. J. 109)—lies the doctrine of estoppel, and ordinarily the United States cannot be estopped by the acts of its subordinate officials and agents. Wisconsin Railway Co. *v.* United States, 164 U. S. 190, 210, 17 S. Ct. 45, 41 L. Ed. 399; The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 196. But we think a better answer to this somewhat unique contention of appellant is that no court ought so far to stultify itself as to hold that the United States may be estopped, precluded, hindered, or thwarted in its sovereign duty to

prosecute for crimes by the fact that a subordinate official or one among its many bureaus, disregarding co-ordination, saw fit in pais to do an unwise, hasty, unnecessary, and improvident act. The only exceptions, if in fact they are such, are entrapment, and unlawful search and seizure. See Sorrells *v.* United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249,"

these quotations being from 89 F. 2d at 138.

However, this aspect need not detain us here in view of other considerations which will become subsequently discernible.

It would seem that this Court must perforce look to not only what was attempted or done by Rowan, that is, the composition of 103 in the third person and the destruction of his original notes, however wilful or malevolent his intentions and actions may have been, but also, and more importantly, to what was in fact accomplished by such actions, namely, the overall consequences ensuing from Rowan's conduct and their net effect and impingement, if any, upon the rights of the defendants in this case.

Certainly, whatever Rowan's purpose, his mere grammatical conversion of Smith's narration of the facts in this case from a first and third person account in the interview notes to a final report written only in the third person worked no significant alteration in the ultimate nature of the report so as to immunize the latter to the applicable provisions of the Jencks statute. The report, viz., Exhibit 103, was in fact made available to the defendants immediately upon the discovery of its existence, location, and character. Photostatic copies thereof were accordingly distributed by the Government to defense counsel in order to facilitate utilization of the report during cross-examination of Smith. Thus, in the end, Rowan's intention to circumvent the Act however objectionable it may have been, was completely thwarted once his progress report was made available to the defendants.

This court certainly does not approve or condone in the least Rowan's destruction of his notes, being mindful, as it is, of the admonition of the Court of Appeals of this circuit in United States *v.* Thomas, Second Circuit, 1960, 282 F. 2d 191, 194, that "it would be the better practice to preserve the written notes taken on interviews with persons accused or suspected of crime."

However, it may be fair to point out that Rowan's destruction of his notes occurred in February 1960, prior to the opinions handed down in the Campbell and Thomas cases, wherein this practice was judicially criticized.

What prejudice have the defendants sustained as a result of the destruction of Rowan's original handwritten notes? Defendants claim they have been deprived of an opportunity to use the notes to impeach Smith's testimony. Smith himself emphatically denied that he had ever seen Rowan's original notes; nor is there any evidence that these notes were ever approved or adopted by Smith. If Smith were to be believed there would have been no statements, reports or memoranda at all in existence relating to his testimony which might be producible under Section 3500. But, as the Supreme Court cautioned in Campbell, reliance solely upon the testimony of the Government witness in determining the producibility of statements under Section 3500 must be regarded as improper since the very issue to be determined is "whether the defense should have the document for use in cross-examining the witness." 365 U. S. at

As if in anticipation of the procedure recommended in the Campbell opinion, this court, as mentioned previously, held voir dire examinations of those federal narcotics agents who had worked with Smith in order to ascertain the existence of any documents to which the defendants would be entitled under the Jencks Act. And, as a result of these hearings, the existence of [illegible] was ultimately brought to light and its production and delivery ordered.

The defendants during the trial have been given all pertinent records, papers, memoranda, and so forth deter-

mined to be producible under Section 3500. Without waiting for an appropriate demand by the defendants, the Government has voluntarily made available to them photostatic copies of any existing relevant reports of agents and grand jury minutes relating to the testimony of Government witnesses before these witnesses actually took the stand. Exceptions were made only for the Government witnesses Edward Smith and Suzanne Cadieux.

With respect to Smith, defense counsel were not only supplied by the Government with Rowan's report 103 and the minutes of Smith's testimony before the grand jury, but also with Smith's testimony before a Royal Canadian Rogatory Commission in New York dealing with a case involving certain of the named defendants in the instant indictment then under investigation by the Canadian Government.

In Campbell v. United States, supra, Mr. Justice Brennan declared that the defendants there would have been denied a statement to which they were entitled under Section 3500 if an FBI interview report, which was the only document in the Government files at the time of the trial relating to the testimony given by the Government witness Stasiak, was not the original or a copy of the statement which the witness testified he had given to a Government agent and "thought he signed." Upon inspection of the Interview Report at a voir dire hearing the witness stated not only that he had never seen this report but also that it did not accurately reflect what he had told the agent. On the basis of this testimony alone, and without calling the agent who prepared the report, the trial court refused the defendants access to the Interview Report and denied their motion to strike the witness's testimony. Hence, in Campbell, the defendants were totally deprived of the use of any documents which might have been used to impeach the Government witness. As the Supreme Court pointed out, if the FBI Interview Report was not the original or a copy of the paper described by the Government witness,

there was the possibility that another paper or statement had existed which satisfied the description of the witness and which might have been destroyed. The unexplained loss of this document, if such did exist, plus the trial court's refusal to order the delivery of the Interview Report to the defendants under Section 3500 precluded defense counsel from any effective impeachment of the Government witness' testimony. The origin of the FBI Interview Report in Campbell therefore remained unknown and its relationship, if any, to the witness' original statement was likewise obscure. The failure of the trial court to resolve these questions led the Supreme Court to remand the case for further proceedings.

In United States v. Thomas, supra, 282 F. 2d 191, the Second Circuit Court of Appeals found that the destruction of an FBI agent's handwritten notes of an interview had with a Government witness did not prejudicially frustrate the defendants' cross-examination of the witness. As Circuit Judge Moore stated:

"* * * There was, however, a report which on the basis of credible evidence accurately reflected Demakakos' story as outlined in the agent's notes. Assurance of accuracy was given and the report delivered to defendants' counsel. Defendants thus had an opportunity to cross-examine Demakakos in the light of the story he told upon his interview and they thereby received the benefits intended to be bestowed by Section 3500."

282 F. 2d at 194-195.

It is true that in Thomas the Circuit Court found no intent to suppress evidence in the destruction of the agent's original notes. However, this consideration would appear to have been less decisive than the fact that there was nonetheless available to the defendants a report found to be a substantially accurate reproduction of the destroyed notes which was allowed to defense counsel for possible use in the cross-examination of the Government witness.

Of more vital and crucial significance, therefore, was the effect upon the defendants of the Government's inability to produce the agent's notes rather than the cause of their nonexistence, namely, prior destruction by the agent.

Hence, in the case presently on trial, the destruction of Rowan's notes, whether viewed as done wilfully in a deliberate attempt to avoid the application of the Jencks Act or as a routine method of disposing of such notes, did not in the final analysis preclude the defendants from receiving "the benefits intended to be bestowed by Section 3500."

United States *v.* Thomas, supra, 282 F. 2d at 195.

The attorneys for the defendants had at their disposal Rowan's report, marked Government's Exhibit 103 for identification, which, as I have mentioned, on the basis of all the credible evidence, elicited for the most part from Rowan himself, must be deemed a substantially accurate reproduction of the notes Rowan had taken during his interviews with Smith. Furthermore, according to Rowan, it was the report 103 alone which he read over with Smith to check its accuracy. Again Smith was subjected to a rigorous and extended cross-examination by defense counsel, who were able to pursue their interrogation with considerable latitude. The defendants were thus afforded an opportunity to cross-examine Smith "in the light of the story upon his interview and they thereby received the benefits intended to be bestowed by Section 3500."
United States *v.* Thomas, supra, 282 F. 2d at 194 and 195.

Included as well in the defendants' arsenal of impeachment material against the witness Smith were the minutes of his testimony before the Federal grand jury and the Royal Canadian Rogatory Commission, all of which were generously exploited by defendants from every possible angle to their best advantage.

Consequently, I am unable to find, after a careful study an [sic] evaluation of all the facts and circumstances in this

case, that the Government's inability to produce the handwritten notes taken by Rowan during his interviews with Smith, due to their prior destruction by Rowan prejudiced or frustrated the defendants' cross-examination of the Government witness Smith.

As the Court of Appeals advised in the Thomas case:

"In resolving this question the facts must be critically examined."

282 F. 2d at 193. The court has endeavored to be guided by this cogent admonition and concludes that it is constrained to deny the defendants' motion to strike the testimony of Smith.

Statutes Involved

TITLE 18, UNITED STATES CODE

§ 201. Bribery of public officials and witnesses

* * *

(h) Whoever, directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of his absence therefrom . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

* * *

(j) Subsections (d), (e), (h) and (i) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, involving a technical or professional opinion, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

* * *

§ 209. Offer to witness

Whoever, directly or indirectly, gives or offers any money or thing of value, or any promise or agreement therefor, or any other bribe to any person being, or about to be, a witness upon a trial, hearing, or other proceeding, before any court or any officer authorized by the laws of the United States to hear evidence or take testimony, upon any agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from

the trial, hearing or other proceeding, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

§ 3500. Demands for production of statements and reports of witnesses.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Statement of the Case

1. The Evidence against Petitioner

Petitioner was implicated in the conspiracy charged solely by the testimony of two witnesses.

At the first trial, one Mlle. Cadieux, a Montreal brothel-keeper with a criminal record, told a bizarre story of being present while petitioner, in Montreal, arranged for an American lawyer to buy narcotics. The American lawyer was to have stated that he could be counted on "to protect those who were pushing the heroin." (163-8a) Mlle. Cadieux refused to come to the United States for the second trial. (3874-77). She told the prosecutor that she would not return to "perjure herself". (248a) Her deposition was taken in Canada. She repudiated, as completely false, her testimony at the first trial (223-5a) and testified that she had been induced to incriminate petitioner by the hope of securing better treatment for her incarcerated paramour and the promise of money from the prosecuting authorities. (180a, 190a, 193a, 208a, 210a) At the second trial both the original testimony and the repudiation were admitted in evidence.* (8720-22)

The only other witness against petitioner was one Edward Lawton Smith, an underworld character, who told of an initial meeting with petitioner in Montreal during April or May, 1957,** at which he was entrusted with narcotics for delivery to New York. (144-54)

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* The prosecutor was twice permitted to testify that he had not the "slightest doubt" during the first trial that Cadieux' story was the truth (239-42a). Motions for a mistrial were denied with instructions to the jury that the prosecutor's testimony was admitted solely on the issue of whether the prosecutor had "suborned perjury" (259a, J. A. 133a).

** Smith dated the meeting differently at the first and second trials (1933-35). Many witnesses testified that the Montreal meetings could not have happened at the various places which Smith named (372-3a, 479-80a). In addition, Smith admitted that in 1958, in deportation proceedings in New York, he testified under oath that from April to October 1957, the period in issue, he worked 7 days a week in the Province of Ontario (126-8a).

Smith testified that he saw petitioner only twice more: both times in New York during June 1958. He testified that on the first of those occasions, he merely observed petitioner in a restaurant in the company of some other defendants. (41-2a) The second time, according to Smith, petitioner was supposed to have, at an open street corner rendezvous, entrusted him with narcotics for further delivery in New York (43-4a)—a story hardly consistent with the prosecution's and Smith's description of petitioner as the "top banana" of the conspiracy. (1196)*

Smith had been expelled from school at the age of 15 for lying. (135a) He had been twice convicted of burglary and he admitted that he had committed perjury before the Grand Jury which had returned the indictment. He admitted numerous other instances of perjury. He frankly said that he would perjure himself whenever "he was sufficiently afraid." (J. A., 133a)

2. The Illegal Derivation of the Evidence Against Petitioner

Between the middle of November 1959 and March 1960, narcotics agents, in cooperation with New York City detectives, engaged in extensive wiretapping of conversations to which petitioner was a party (Pet. App. 80a, 82a, 84a,

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* To contradict the testimony of Smith that petitioner was seen by him in New York on two different occasions during June 1958, petitioner introduced the testimony of several witnesses who saw petitioner in Florida almost continuously, from the beginning of May to July 20, 1958 (378-9a, 486-93a, 513a). Other witnesses, who could have filled vital gaps, were waiting to testify at the time when petitioner was without counsel (Pet. 8-16). Petitioner could not bring himself to make a decision, unaided by counsel, as to whether he should put them on and have them examined by the court (451-5a). Confronted by this hesitation, the court "freed them from the penalties of contempt" and they left (454-5a). The testimony of two, given at the first trial, was later read to the jury (486-93a).

85-6a, 93a). As a result, petitioner and others were subjected to extensive surveillance by the City detectives and the federal agents (Pet. App. 83-4a, 86-95a). However, neither the taps themselves nor the surveillance showed petitioner in any way to be connected with narcotics (Pet. App. 95-8a, 113a).

Among the narcotics agents who participated in the wiretapping, and the surveillance of petitioner which followed, was narcotics agent William A. Rowan (Pet. App. 80a, 85-6a). Fresh from these activities and frustrated because they revealed no evidence of guilt, Rowan, nonetheless, set out to vindicate suspicions first kindled by the wiretaps.

In January of 1960, he approached Smith, who, in October 1959, had received $5,000 for testifying before a Canadian Rogatory Commission. At that time he had not mentioned anything about petitioner (74-5a, 110-14a). Rowan testified that he initiated the negotiations for the illegal purchase of Smith's testimony as follows:

> "I began by explaining why I was there. I told him that I was authorized to offer him $5000 if he would testify against some defendants in a case which I was developing. I pointed out to him that he had already received monies in a previous case from the government, and that this was an entirely different matter." (405a)

At the first trial, Rowan described the same transaction as follows:

> "I told exactly what I was told, that the Government would pay him $5000 if he would testify in this case." (F. Tr. 6736)

When Smith explained that "he might not be able to help" because he was having financial "difficulty" Rowan "reiterated [his] promise or rather [his] guarantee of $5000 if he would testify . . . ." Smith then "indicated he was willing to testify for the government" (405a).

However, this transaction did not result immediately in Smith's naming of petitioner as a "conspirator". Petitioner was not mentioned in Smith's first statement to Rowan in January 1960 (Court's Ex. A-51A for identification, Di Pietro's Ex. AO in evidence).

Difficulty arose in February 1960, just prior to Smith's first scheduled testimony. Smith refused to make his initial appearance before the Grand Jury which returned the indictment because "he had received no payment . . ." (7792; see also, F. Tr. 6740, 6743). Smith entered the Grand Jury room to give testimony only after, in the Grand Jury anteroom, three federal agents promised him $1500 for so doing (F. Tr. 6737-9, 7786-7). Thereafter, Smith was paid the $1500 promised* (F. Tr. 6744).

Still, petitioner was not named in Smith's Grand Jury testimony. (109-10a, 113-4a)

Smith only spoke of petitioner in connection with other defendants at the end of April 1960—"a week or two weeks prior to his last appearance before the Grand Jury". This was at the time Smith was put on a "per diem" and began receiving $360 to $370 a month as an added "inducement" to testify. (F. Tr. 6829) He continued to be paid his "per diem" during his testimony at the first and second trials (64-5a; 2456) (F. Tr. 6813-14) Up to that time he had only spoken of petitioner as a man known by him to be part owner of a restaurant in Canada. This, even though Rowan showed him a photograph of petitioner "about

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*Smith received an additional $2,500 for expenses and witness fees (J. A. 133a). Rowan testified that Smith was offered other "things of value for his testimony". He was promised that if he "would just go along" he could probably "realize a lot of money" from "the sale of the story of this trial" because Rowan's District Supervisor knew a magazine writer who wrote stories about narcotics (7709-10; F. Tr. 6827-8). Smith was also told that he might make money from "various television programs that were on this particular subject at that time . . ." (7710; F. Tr. 6828-9).

twenty times"—"as often as [he] carried" it. (F. Tr. 6811-2; 7721)

Even then, Smith told Rowan that he had seen petitioner "only two times"—in the Spring of 1957 and in June of 1958. (F. Tr. 6815-6)

Only later, after his last Grand Jury appearance, did Smith describe a third meeting with petitioner—a fantastic street corner rendezvous at which Galante, the accused chief man in the conspiracy, entrusted him with narcotics for distribution in New York City (135-6a; *supra* (App. 23a)).

Smith frankly admitted that one of the "prime considerations" for his giving testimony at trial was that he was on the government payroll. He also testified about his understanding at the first trial that he could receive an additional "reward". (65-7a)

3. The Improper Destruction of the Witness' "Jencks Act" Statement

At the conclusion of Smith's direct testimony at the first trial, petitioner's counsel requested Jencks Act* material, *inter alia*, notes of federal agents to whom Smith had made statements about the case. (F. Tr. 1895-96)** For two days the chief prosecutor blandly assured the court that the government had no such statements in its possession. (F. Tr. 1896-97, 1901-2, 1904, 3264, 3269-71, 3273) Four agents who had participated in the investigation of the case were still in government employ and none of them recollected that any statements were taken. (F. Tr. 3304-5) According to the prosecutor Rowan, the fifth agent, who had by then left government employ, "could not be immediately located." (F. Tr. 3306) The prosecutor suggested that the

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* 18 U. S. C. §3500.

** Rowan was in fact contacted on the morning of the second day by Agent Matuozzi, who, when Rowan told him of the existence of Jencks material said "I wish you hadn't told me that." (F. Tr. 6963-64)

court could dispense with Rowan's testimony since District Supervisor Gaffney would be "familiar" with whether Rowan had taken any statements from Smith. (F. Tr. 3309). Actually, Gaffney, on locating Rowan, attempted by threats to discourage him from testifying to the existence of Jencks Act statements.*

Despite the threats, Rowan appeared and testified, in substance, that he had taken "substantially verbatim" handwritten notes of the witness' statements about the case: (F. Tr. 3675-77, 3694; 6697). He incorporated the substance of those notes in a typewritten "progress report". (F. Tr. 3678-79, 3794-92). However, he omitted from the typewritten report matters which he deemed "unimportant" and added others which he obtained from sources other than Smith. Moreover, he changed the phraseology to reflect what Smith had said entirely in the third person, and he improved the verbiage. (F. Tr. 3694, 6936). Thus it was made difficult, if not impossible, to determine precisely what was said by Smith and what was said by others. The copy of the typewritten report which was ultimately found had been "gone over" with Smith and handwritten changes, some in Smith's handwriting, were made on that copy. (F. Tr. 6150-52). Ultimately, Smith denied ever having seen the report, or, for that matter, ever having made a statement to Rowan (App. 3a). Incidentally, the court disbelieved Smith and expressed his conviction "of the authenticity" of the report (App. 4a).

At least four copies had been made of this report. Two were furnished to Gaffney, Rowan's former supervisor, one to the prosecutor, and one had been retained by Rowan in the file which he had kept at the Bureau of Narcotics. (F. Tr. 3768, 3792, 3805-6).

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* Gaffney threatened Rowan by telephone that "if [he] testified that [Jencks materials] existed he [Gaffney] would have to get up and say certain things about [him]" which would put his job "in jeopardy . . . ." (F. Tr. 6943-44, 6947).

Unfortunately, the prosecutor, as well as the four agents still in government employ, had no recollection whatsoever of the preparation of this crucial report.* (F. Tr. 3690, 3779, 3486-88, 3493, 3521, 3530-31, 3534-36, 3543-45, 3547-48). Not only had all the persons concerned with the prosecution and still in government employ succumbed to this lapse of memory, but the government files themselves were strangely incomplete, for the basic report in the case was nowhere to be found. (F. Tr. 3683-91, 3717-19). No copy could be found except Rowan's personal copy, which he was able to locate in an unlikely place. (F. Tr. 3730-37).

Perhaps the unlikelihood of the place where Rowan was able to locate his copy of the report saved that copy from whatever forces were responsible for the disappearance of the other copies. In any case, the one surviving copy was turned over to the defendants and was eventually received in evidence. (DiPietro's Ex. AO in evidence.) Smith taking the lead of the government, then did his bit "[t]o circumvent the Jencks decision", denying ever having seen the typed report and any responsibility for its contents.

The defendants moved to suppress the testimony of Smith on the ground that his original statement to Rowan, i.e., the handwritten notes, had been destroyed. Rowan had

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* Rowan testified that the prosecutor went over the report with Smith in his presence (F. Tr. 3768, 3792, 3805-6). The prosecutor did not recall. Nor did he recall whether certain of the handwritten insertions and corrections on the report were made by him (F. Tr. 3769). Rowan also testified that the prosecutor, with narcotic agents, used the statement in interrogating Smith, and had a copy of it with him when he spoke to Smith in the Grand Jury anteroom (F. Tr. 3695, 6756-57).

If it could be shown that the prosecutor did recall the Rowan report and Smith's familiarity with it, an additional ground for reversal of petitioner's conviction would be presented, for "the defense" impeachment of Smith, the main witness against petitioner, was hindered by the perjured testimony. *Napue* v. *Illinois*, 360 U. S. 264.

explained that he had destroyed his contemporaneous and verbatim handwritten notes of Smith's statements to him "[s]o that they would not become available under the Jencks decision." (F. Tr. 6929; see also F. Tr. 7162.)

Moreover, his typewritten report was deliberately dictated in the "third person" because he "understood that if such were done it wouldn't fall under the Jencks decision." (F. Tr. 6904, 6908). In passing we might note that Rowan's changes probably took the typewritten report out of the category of statements described in 18 U. S. C. § 3500 (e) (2), i.e., substantially verbatim statements. The trial court thought that it was probably producible under both subsections (e) (1) and (e) (2) (App. 10a).

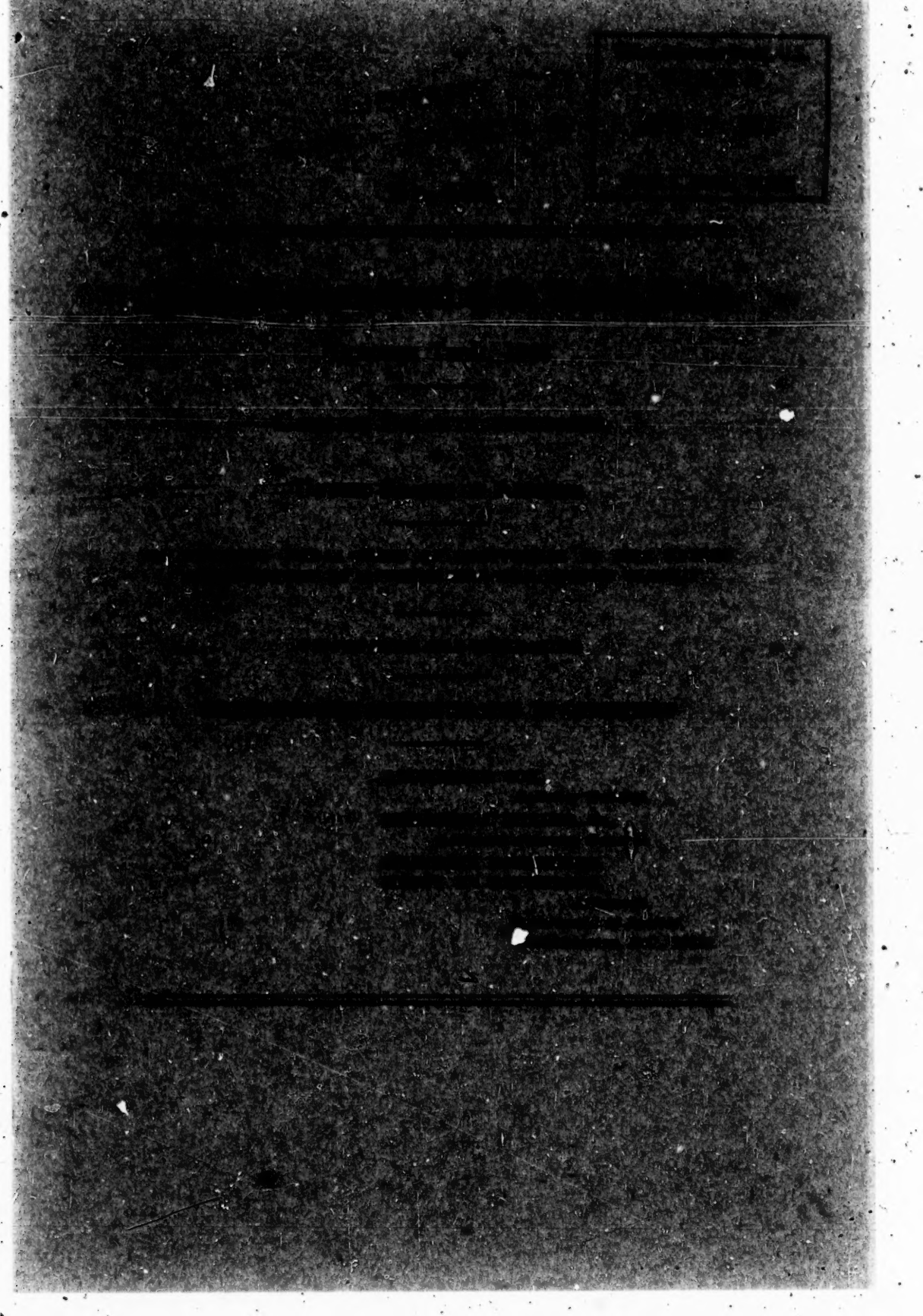
The trial court found that Rowan's original handwritten notes were "a substantially verbatim" recital of "an oral statement" and producible under subsection (e)(1). The trial court further found that they were destroyed by Rowan with the intent to deprive the defendants of rights accorded them by the Jencks Act. (App. 12a, 14a.) Nonetheless the trial court refused to strike Smith's testimony. The court advanced as a possible justification for its holding the doctrine that estoppel should not run against the sovereign, i.e., that the government should not be cheated out of a conviction because someone as "subordinate" in the governmental hierarchy as a narcotic agent had deprived the defendants of rights which this Court and Congress has accorded them. (App. 12-14a.)

The trial court also suggested that "subsection (d) on its face has no application in and of itself" where the "government's failure to produce is due to a prior destruction of the statement" (App. 11a).

The main justification for the court's holding, however, was that the defendants had not been harmed by the admitted deprivation of their rights because the typewritten report was a substantially accurate reproduction.

of the original handwritten notes (App. 10a, 18a). The destroyed notes were, of course, not available to the trial court. In holding that they were substantially identical with the typewritten report the court had to disregard the fact that the typewritten report contained material that, according to Rowan, did not come from Smith. The court also had to rely on Rowan's editorial skill in eliminating only what was "unimportant".

The motion to strike Smith's testimony because of the destruction of the handwritten notes was renewed at the second trial. The court incorporated the Rowan *voir dire* of the first trial in the record and adopted the opinion of the first trial court so that petitioner's appeal properly brought up the entire proceeding for review (805l).



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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 468

CARMINE GALANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ON PETITION FOR REHEARING

BRIEF FOR THE UNITED STATES IN OPPOSITION

The petition for rehearing rests upon three contentions: (1) that notes of interviews with Smith, the government's key witness, were destroyed for purposes of circumventing the Jencks Act; (2) that the government made substantial payments to Smith to obtain his testimony; and (3) that this Court's reversal of the contempt conviction of co-defendant Panico undermines the foundation of the trial court's refusal to grant a mistrial. None of these contentions is meritorious.

1. *Alleged violation of 18 U.S.C. 3500.* Petitioner's contention in this regard relates to the alleged de-

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struction of handwritten notes made by former narcotics agent Rowan. The significant part of Rowan's testimony was given during the second trial. However, in view of the fact that the petition for rehearing is based on testimony at the first trial, it becomes necessary to review the Rowan testimony chronologically, beginning with the first trial.

(a) *Rowan's testimony at the first trial.* On January 11, 1961, Smith (the government's principal witness) testified upon cross-examination that Rowan was the first man to question him as to some of the defendants (F. Tr. 4442),[1] and that Rowan did not take notes upon this occasion (F. Tr. 4447). Counsel for petitioner Mr. Wadden, told the court that the defendants should not be bound by what this witness said in that regard and asked for a voir dire examination of the four agents who had talked with Smith (F. Tr. 3264). These agents were thereafter produced by the government. Under examination by Mr. Wadden, Rowan testified that he was no longer a federal agent, but had served in that capacity from October 8, 1956, to August 15, 1960. He met Smith in January 1960, at the latter's home, talked with him four or five hours and made notes in his presence (F. Tr. 3674–3675). He conducted similar interviews on four or five later occasions and eventually transposed his notes into a progress report (F. Tr. 3675–3678—an informal document, not an official report, to be forwarded through channels. There were three or

[1] In order to avoid confusion, we use the same symbol, "F. Tr.", employed by petitioner to designate the former trial or first trial. "Tr." designates the transcript in the second trial.

four copies, the present location of which he did not know. (F. Tr. 3679–3680). Rowan testified as to his notes: "After I had transposed them into a typewritten set, I think I destroyed them" (F. Tr. 3693). "I might have put (them) in better verbiage, but substantially what I had been told" (F. Tr. 3694). Mr. Tendy, Assistant United States Attorney, stated that the prosecution had found no reports of Rowan among the three or four file cabinets of this case but would continue to search (F. Tr. 3685–3686).

At the next session of court, Rowan testified that he had found a report (marked for identification as Gov. Ex. 103) of his various interviews with Smith in a folder relating to another matter. It was not a part of the formal files (F. Tr. 3730–3731), bore no date or signature (F. Tr. 3739), and represented "the sum of three or four days of sitting down and talking with Smith and getting his story down in notes and then taking those notes and having them transcribed into a typewritten report." (F. Tr. 3740; see also 3770–3773, 3784). Rowan said that he went over the report with Smith and made various corrections in his own handwriting (F. Tr. 3750–3751). There were no other reports that would recite substantially verbatim conversations with Smith (F. Tr. 3795–3796). In response to a question by one of the defense attorneys, Rowan explicitly denied that there was any directive from his superiors to destroy his original notes (F. Tr. 3799)—"I destroyed them myself. I was finished with them."

Rowan stated that he delivered the original and a carbon to his district supervisor, Mr. Gaffney, gave

a copy to Mr. Tendy and retained one copy himself (F. Tr. 3805). He never went over the report with Mr. Gaffney (F. Tr. 3809–3810). The government agreed that the report should be turned over to the defense under 18 U.S.C. 3500. At the request of Mr. Betz, attorney for another defendant, the court instructed the witness that he should make himself available on call as a defense witness (F. Tr. 3812–3813).

On February 7, 1961, Mr. Wadden, petitioner's counsel, stated that he wished to recall Rowan for questioning about the notes. His understanding was that Rowan would be recalled as a witness for the court to give the defense an opportunity to ascertain whether he (a) destroyed his original notes, (b) transcribed them into a first-person report which he destroyed after preparing a third-person report, and (c) did this for an improper purpose and with the knowledge and acquiescence of his superiors (F. Tr. 6263). Reference was made to the fact that Rowan had testified on a motion for a new trial filed on behalf of defendants in *United States* v. *Aviles*, 197 F. Supp. 536 (S.D.N.Y.), that he had destroyed his notes to avoid production under 18 U.S.C. 3500 (F. Tr. 6294, 6301–6303).[2] Government counsel, Mr. Tendy, stated

[2] The trial judge in *Aviles* reached the following conclusions as to Rowan, 197 F. Supp. at 555: "His conduct at these hearings indicates that Rowan is emotionally unstable and testimonially unreliable. Indeed, he differed with movant's counsel with respect to what transpired during conversations between them prior to his testimony at the instant hearings.

Having observed Rowan's demeanor on the witness stand and having heard his vacillating and self contradictory testimony, and in view of his obvious bias and ill will towards

under oath that he had no recollection of ever having seen the report, Gov. Ex. 103 (F. Tr. 6334). The district court denied a motion to strike Smith's testimony (F. Tr. 6644–6658).

The defense then called Rowan as its first witness. The court questioned the propriety of going into matters already covered, but allowed counsel to proceed (F. Tr. 6660–6665). The testimony elicited from Rowan as a defense witness is the basis of the present motion.

After describing again the circumstances of his contacts with Smith in January 1960 (F. Tr. 6692–6693), Rowan testified that he made thirty or forty pages of notes (F. Tr. 6698); that his report (Gov. Ex. 103) reflected those notes (F. Tr. 6721); that he went over the report with Smith, making certain insertions, but deleting nothing (F. Tr. 6751–6752); and that the original notes were about half in the first person and half in the third person, while the report was entirely in the third person (F. Tr. 6902–6904). After a colloquy between the court and coun-

---

the Federal Bureau of Narcotics and his superior, his pecuniary interest in testifying here and the credible evidence presented at these hearings, the Court finds Rowan's testimony as to his purpose at the time he destroyed the alleged notes, if in fact there were notes of the character claimed by him, unworthy of belief. A far more plausible explanation of his destruction of such notes as he may have had is simply that after having no further need for them, he destroyed them in accordance with his invariable practice."

The denial of a motion for a new trial in that case was affirmed by the court of appeals. 315 F. 2d 186. While this Court has remanded that case for reconsideration it was not in relation to Rowan's notes but to a wholly different issue.

sel as to what difference this formal change would make, the court asked (F. Tr. 6908):

> The COURT: Why did you put 103 in the third person. That is it in essence.
>
> A. So that it wouldn't fall under the Jencks decision.

Rowan further testified that he destroyed his notes "[b]ecause it was agreed that I would destroy the notes after I made up my report." This agreement, he stated, was with Gaffney and Pera, his superiors. He declared, however, that he did not receive explicit instructions and could not give the substance of his conversations with Gaffney (F. Tr. 6923, 6926). When he repeated that he had destroyed the notes, with the knowledge of his superiors, so that they would not be available, the court asked (F. Tr. 6929):

> The COURT: How? Did anybody tell you to destroy records, to destroy notes? Just answer that question.
>
> The WITNESS: Again, no, no.

Rowan testified that he told Pera and Gaffney that he was going to destroy the notes. Asked what the latter had said, Rowan replied (F. Tr. 6930):

> I don't recall, sir. * * * He just acquiesced to what I told him I was going to do. He didn't say anything.

The court inquired as to the procedure followed in preparing the report (F. Tr. 6933):

> The COURT: Did you follow the notes generally speaking?
>
> The WITNESS: Yes, sir.

* * * * *

The COURT: Did you compare the transcription with the notes?

The WITNESS: Yes, sir.

The COURT: How did it appear?

The WITNESS: It was what I had in the notes except that it had been changed to the third person in all instances.

The COURT: That was the only difference, in substance, at least?

* * * * *

The WITNESS: That's right, sir.

Q. When you dictated your report, which is GE 103, did you attempt to place in the report those things which you thought were important and leave out of the report certain matters which you felt were immaterial?

* * * * *

The WITNESS: I did make some additions involving the case about things that Smith had not told me, and I left things out that, in my opinion, were not important.[8]

The court again denied the motion to strike Smith's testimony, giving its reasons in the "Opinion of the District Court", set forth in the appendix to the petition for rehearing at pp. 1a–19a (F. Tr. 10489–10521).

[8] Rowan also testified as to the "threats" which were made against him, *i.e.*, Mr. Gaffney had called him on the phone and told him that if he testified that the report existed, Gaffney would have to get up and say certain things about him that would jeopardize his job (F. Tr. 6942, 6947). On January 5, Rowan told agent Matuozzi over the telephone that there was a report. Matuozzi said he was sorry that Rowan had told him that: that they had looked for it but couldn't find it (F. Tr. 6963). Rowan testified at the instant trial that he was asked to resign from the Bureau of Narcotics in August 1960 because he did not divulge the true circumstances of an automobile accident (Tr. 7805).

(b) *Rowan's testimony at the second trial.* At the second trial, Rowan again testified, as a defense witness, to his former employment as a narcotics agent (Tr. 7643–7644).[1] He stated that in January 1960 he told Smith that he was authorized to offer him $5,000 if he would testify for the government (Tr. 7647–7651), and also saw Smith on four other occasions closely following his initial visit (Tr. 7656–7658). He accumulated about thirty or forty pages of notes during that time (F. Tr. 7659), which he transcribed into court's exhibit A 51 A (Tr. 7661). With respect to the typewritten report which Rowan made from his notes, he testified that "[t]here are some additions and there are some deletions, and there are some corrections" (Tr. 7714); and that these changes were made by Smith, who had read the report, for purposes of clarification (Tr. 7714–7718). The report was received in evidence for the defendants without objection (Tr. 7727–7728). No motion was made to strike the testimony of Smith. At the conclusion of Rowan's testimony, the following colloquy took place (Tr. 7818):

> Mr. KRIEGER (Attorney for DiPietro and Fernandez): My second application is that would your Honor incorporate in this record the voir dire examination of this witness at

[1] The volume of the transcript which includes the testimony of Rowan at the second trial is no longer with the other volumes in the case. References to his testimony in this trial must therefore be checked to the transcript lodged by the government in *Panico* v. *United States*, No. 45, this Term.

> the previous trial in so far as it pertained to Section 3500 of Title 18, more particularly thereunder the destruction of those handwritten notes.
>
> The COURT: I will take that under advisement. My present inclination is not to.

At the conclusion of the trial, the following took place (Tr. 8051):

> The COURT: Mr. Krieger, I will incorporate the voir dire as to Rowan in this transcript and I will also adopt Judge Levet's rulings with respect to it, the motions made under 3500 with respect to it in so far as they are applicable here.
>
> Mr. KRIEGER: Yes, your Honor, thank you.
>
> The COURT: I might add that in my opinion it is no longer of any significance in view of Rowan's statement on the stand that whatever was contained in his notes was incorporated, all of it, into Court's Exhibit A 51 A for identification, and I cite United States v. Thomas.

The motion was made applicable to all defendants.

(c) *The legal consequences of Rowan's action.*

The "Jencks Act" issue was not raised in the court of appeals by any of the fifteen defendants. It was not raised in any of the petitions for certiorari. Indeed, it is highly questionable whether it was adequately raised at the trial itself. The motion to strike Smith's testimony under 18 U.S.C. 3500(d), and Judge Levet's thorough and well-reasoned opinion denying that motion, belonged to the first, abortive, trial. The motion to strike was not renewed at the

second trial. There was, to be sure, a request by one of the defense attorneys at the end of Rowan's testimony that the *voir dire* examination of Rowan from the previous trial be incorporated in the record—a request which was granted by Judge MacMahon, who also adopted Judge Levet's prior rulings. We submit that this perfunctory motion to incorporate the earlier *voir dire* was hardly tantamount to a motion to strike the testimony of the principal government witness at this long and stormy trial—a motion which, if granted, would have compelled a directed verdict of acquittal for many of the defendants. Plainly, the able and experienced lawyers who represented these defendants would not have given the matter so little attention at the trial, and refrained from raising it on appeal, had they believed their clients were in any way injured by the substitution of the typewritten report for the original longhand notes.

Even had the point been raised, there is no merit to the contention that the unavailability of the handwritten notes compels the suppression of Smith's testimony. Here, as in *Aviles* (see fn. 2, p. 4, *supra*), Rowan's contradictory statements made it difficult to determine his true motive for destroying the notes, and Judge Levet appears to have made no finding on that point. Whatever the motive, it is clear, as Judge Levet noted, that the Jencks Act was not in fact circumvented. Rowan's typewritten report, which was voluntarily turned over to the defense immediately upon its discovery (in a file not pertaining to this case), was substantially identical to the notes,

except that it was written in the third, rather than the first person. Neither the defense nor the prosecution suggested that anything of significance in the notes was omitted from the report. Apparently the only feature of the interviews with Smith which the defense found useful was the fact that Smith was initially reluctant to implicate the petitioner. But that fact was fully disclosed in the report and freely conceded by Smith on the witness stand. In these circumstances, it was entirely reasonable for the trial court to conclude that the substantial rights of the defendants were not impaired.

2. *Goverment payments to Smith.* Petitioner's assertion of improper payments to Smith rests entirely on the testimony of Rowan as a defense witness and ignores completely the other evidence in the record. That evidence makes it clear why, in the thorough briefing of this case, no other counsel has ventured to suggest that the government was engaging in bribery.

Rowan, first called to testify about his report, described in detail his first meeting with Smith in January 1960, without mentioning any conversation concerning payment to Smith of $5,000 or any other amount (F. Tr. 3674–3717). When later called as a defense witness (*supra*, pp. 5–7), he testified that, with Gaffney's authority, he offered Smith $5,000 (F. Tr. 6724), and that in March or April of 1960 Smith was placed on a per diem (F. Tr. 6827–6829). Rowan also testified that Smith had refused to go into the

grand jury until induced to do so by Gaffney's promise to pay him $1,500 (F. Tr. 6743–6744).

At the second trial Rowan stated that in January 1960, he went to Smith's home and offered him $5,000 if he would testify for the government (Tr. 7649–7650). He gave the date of Smith's alleged refusal to testify and the promise of $1,500 as February 15, 1960 (Tr. 7702–7703). Rowan again testified that in March or April of 1960 Gaffney arranged for Smith to be paid a per diem (Tr. 7706–7707). In both trials the payments to Smith were freely testified to by government witnesses before Rowan gave his testimony. This testimony, supported by the records of payments to Smith, completely refuted Rowan's account.

Smith was arrested in New York City in April 1959 and shortly afterward agreed to work as a special employee for the Bureau of Narcotics (F. Tr. 3286–3289). Although there was some variance in the testimony as to the exact amount which Smith received each month, all the witnesses agreed that his per diem commenced at the time he started work for the government. This was in marked contradiction to Rowan's testimony that the per diem began only in April or May 1960, after Rowan made contact with Smith. Smith testified at the first trial that he was paid, from the date of his arrest and employment by the Narcotics Bureau to the date of his testimony, at the rate of approximately $360 per month, with the exception of two or three months (F. Tr. 2264–2268). About September 1959, he received $5,000 from the United States Government for his work in connection with the Canadian investigation. A month or two later,

he received $5,000 from the Canadian government after the Rogatory Commission (F. Tr. 2267–2268). All this occurred before Rowan allegedly made the offer of $5,000 in January 1960.

Agent Dolce testified with regard to a payment of $1,500 which, according to records produced by the government, had been made to Smith in February 1960. He stated that from September 1959 to January 1960, with his supervisor's knowledge, he had personally advanced Smith's per diem allowance, knowing that he would be reimbursed by the government. In February 1960, Dolce submitted a voucher for $1,500 (which Smith signed on February 29, 1960 (F. Tr. 5329)) and received his reimbursement in March. The $1,500 covered 150 days at $10 per day (F. Tr. 5199–5206). The voucher itself read (F. Tr. 5323):

> Per diem paid to Joe Beard [6] $10 per day for 150 days, commencing September 15, 1959, terminating January 28, 1960 for services rendered in connection.

Underneath was written (F. Tr. 5324):

> Received for cash subvoucher. To be used when invoice is not available. Received in cash from Narcotics Agent John M. Dolce $1,500—

Smith, too, testified that this sum reimbursed Dolce for money he had taken from his own pocket to pay Smith. Smith signed the voucher so that Dolce could be reimbursed (F. Tr. 5325–5326). The testimony regarding the payments to Smith was repeated, and the records again produced, at the second trial (Tr. 3074–3075, 3132, 3175).

[6] The name used for Smith on the Bureau's records.

There is no merit to the claim that such payments constitute bribery of a witness or have any relation to 18 U.S.C. 209. The payments were made under the authority of 31 U.S.C. 529a and were reasonable for the services rendered. Smith risked his life every time he dealt with Cotroni in Montreal and, after such dealings, conferred with agents of the American and Canadian governments. On one occasion, he and Agent Biase drove with the conspirators to Cotroni's house in the Laurentians, where Cotroni confronted him with his suspicions about Biase. Smith told Cotroni that Biase was his partner and that they would do business together or not at all (Tr. 1800-1811). By his calm behavior he was able to quiet Cotroni's suspicions and eventually to break this case. Smith was paid for his undercover work in a dangerous capacity.

3. *Reversal of the Panico contempt conviction.* The claim of prejudice from the extravagant conduct of Salvatore Panico, Mirra and other defendants was thoroughly canvassed in the extensive petitions filed in this case. This Court's decision reversing Panico's contempt conviction (*Panico* v. *United States*, 375 U.S. 29) on October 21, 1963, predated the denial of the petitions for writs of certiorari in the instant case (on December 9, 1963) and were called to the Court's attention by some of petitioner's co-defendants. The implications of that decision were discussed in the government's memorandum in opposition to the petition of co-defendant Mirra (No. 705 Misc., this Term), which was also denied on December 9. We there pointed out that the only issue decided by this

Court in *Panico* was that Panico's responsibility for his contumacious conduct should be determined after a hearing under Rule 42(b) of the Federal Rules of Criminal Procedure, rather than summarily under Rule 42(a). There was no determination that Panico was insane,* that his conduct was not contumacious, or that it prejudiced the jury against other defendants. This contention, like the allegation of denial of right to counsel, is merely an attempt to reargue matters raised in the original petition. For the reasons more fully discussed in the government's prior brief in opposition, neither point has merit.

Petitioner prays alternatively that, if his petition for rehearing is denied, it should be without prejudice to his proceedings under Rule 35, F.R. Crim. P., for a reduction of sentence. The government does not oppose that alternative prayer, though it will oppose a Rule 35 motion on the merits.

For the reasons stated, it is respectfully submitted that the petition for rehearing should be denied.

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APRIL, 1964.

*As we point out in our memorandum in No. 705 Misc., this Term, p. 3, New York State authorities, in fuller examination of Panico, have concluded that the earlier tentative diagnosis of schizophrenia was incorrect.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 468

CARMINE GALANTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF ON PETITION FOR REHEARING

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PETITIONER'S REPLY BRIEF ON PETITION FOR REHEARING

The government, at least implicitly, concedes the validity of the reasons which petitioner has advanced for granting rehearing. It rests its opposition on assertions concerning the facts which are decisively belied by the record.

(1) The government stoops to assert that "[t]he motion to strike J.Smith's testimony pursuant to 18 U.S.C. 3500(d) [was not renewed at the second trial". (G. Br. 9-10) In the face of the record, this assertion is, to say the least, astonishing. It is completely refuted most simply by the statement of the Judge at the second trial:

> "... I will incorporate the voir dire as to Rowan in this transcript and I will also adopt Judge Levet's rulings with respect to it, the motions made under 3500 with respect to it insofar as they are applicable here." (8051) (G. Br. 9)

The only motion made "under 2500" at the first trial was to suppress the testimony of Smith on the ground that the destruction of the Rowan notes was the equivalent of non-production (App. 28a).

It is, therefore, abundantly clear that the point was adequately raised below. Indeed, any attempt to belabor this motion any further at the second trial could have led to justified charges that defense counsel were engaging in dilatory tactics.

(2) The government attempts to cast doubts on whether it was established below that the original notes of the narcotics agent were destroyed by him with the specific intent to thwart the Jencks Act. However, based upon ample testimony, the Court found that the agent did have this intent.

That the Court made such a finding is demonstrated by the Court's repeated reference to the existence of the specific intent to thwart the Jencks Act as motive for the agent's destruction of his notes. The trial court's 30-page opinion is devoted wholly to the problem whether the testimony of Smith could be permitted to stand despite the destruction of the original notes with the requisite specific intent. Thus, in his opinion denying petitioner's motion to suppress, the trial judge

(a) stated that the issue to be resolved was that "left open by the Supreme Court in *Campbell v. United States*", 365 U. S. 85 (App. 10a);

(b) relied upon his finding that "[a]t most . . . '[there was] a tacit acquiescence by Rowan's superiors in the destruction of the notes'" in holding that "the Department of Justice should [not] be precluded or estopped from utilizing the testimony of Smith . . . because of the actions taken by subordinate members of the Federal Bureau of Narcotics . . ." (App. 12a);

(c) referred to "Rowan's intention to circumvent the [Jencks] Act however objectionable it may have been"

(App. 14a), but refused to suppress the testimony of Smith on a number of other grounds:

(d) conceded, that *United States* v. *Thomas*, 282 F. 2d 191 (C. A. 2) was distinguishable from this case in that there the Court "found no intent to suppress evidence in the destruction of the agent's original notes." (App. 17a);

(e) ruled that Mr. Justice Frankfurter's expression in his dissenting opinion in the first *Campbell* case that Jencks "statements" not in possession of the government at time of trial may still be produceable where they "are no longer in existence . . . for . . . a reprehensible reason chargeable to the Government" to be inappropriate to this case because the actions of narcotics agents are not "chargeable to the Government." (App. 12a-14a);

Beyond all question, the District Court, in denying petitioner's motion to strike Smith's testimony, accepted the unrefuted fact that Smith's prior statements had been destroyed for the purpose of thwarting the Jencks Act.

(3) In the end, the government relies on precisely the argument most emphasized by the trial judge in denying petitioner's motion to strike Smith's testimony—that "[w]hatever the motive . . . the Jencks Act was not in fact circumvented—[because] Rowan's typewritten report . . . 'was substantially identical to the [destroyed] notes.'" (Gov. Br. 10)

However, the record makes absolutely clear, by the testimony of Rowan, the only person who testified to having seen both the original notes and the subsequent report (Smith denied that Rowan had taken notes of his interviews), that the report produced for the defense differed from the original notes. He added to his report "things that Smith had not told [him]" and "left things out" which he considered to be "unimportant". Rowan also admitted that he "improved" the verbiage and made changes in the narrative form so that the report "wouldn't fall under the Jencks decision". (Pet. 14-15, App. 27-8a)

The government advances the argument that "[n]either the defense nor the prosecution suggested that anything of significance in the notes was omitted from the report."

The suggestion that an accused need rely upon the impartiality and editorial skill of a government agent bent on minimizing a report from production pursuant to 3500, or that, alternatively, he must show that the materials withheld, by reason of their improper destruction at the hands of a government agent, contained matters "of significance" where, by definition, the materials are unavailable for inspection, is surely absurd. If the government's position is sustained it would clearly enable the government to achieve what the narcotics agent expressly desired, namely, to thwart the Jencks Act.

This Court has said that it may be error for an Appellate Court to speculate what an accused's attorney might have found useful for impeachment purposes in *Jencks* statements improperly withheld from an accused, even where the withheld document is available for inspection. *Rosario v. United States*, 360 U. S. 367, 371.

Surely, there is no basis for the suggestion that an accused must convincingly speculate as to what effective use he may have made of a withheld statement, especially where the statement has been destroyed and is therefore not available for inspection by him or by the court.

In any event, it has already been noted by this Court that the withholding from an accused of a witness' prior statements which contain omissions of facts related at trial, or even a contrast in emphasis upon the same facts or a different order of treatment, may be as destructive of the right to cross-examination as the failure to produce a

* The strange absence from the report of any mention of petitioner—despite the unrefuted fact that at the time of its preparation Rowan had, in interviews with Smith, showed him, petitioner's photograph "at least twenty" times (Pet. 14-15)—raises no suspicion in the mind of the government.

statement flatly contradicting the witness' testimony. *Jencks* v. *United States*, 353 U. S. 657, 667.

(4) The government, at least implicitly, concedes that were Smith paid to give testimony in this case, petitioner's conviction, based upon that testimony, would be required to be reversed. However, the government makes the fantastic assertion that Smith "was paid for his undercover work in a dangerous capacity." (G. Br. 14)

This appealing and imaginative version is, alas, pure fiction for which the record furnishes no shred of evidence. Smith's brief "undercover" service in enabling government agents to infiltrate a Canadian based narcotics ring (G. Br. 14) took place in the Spring of 1959. (Pet. App. 11a-13a (opinion of the Court of Appeals)) It ended when Smith and the agents revealed themselves, and terminated their usefulness as "undercover" agents, by testifying. Agent Biase, whom Smith had introduced into the Canadian ring, testified in July, 1959 (3352) and Smith, before a Canadian Rogatory Commission in September, 1959. (App. 24a)

Smith received the large sums of cash in question over a period of two years *after* he had exposed himself as a witness for hire and had terminated his usefulness as an undercover agent. (G. Br. 12; App. 24a) The record shows that the only, indeed, the only possible, purpose of the government's payments to Smith in 1960 and 1961, during which period he was testifying before the Grand Jury and at the first and second trials, was to induce him to give testimony against defendants (including petitioner) not part of the Canadian ring.

The only evidence of the purpose for which the government paid Smith great sums of money during the time he was giving testimony, came from the testimony of agent Rowan and Smith, himself.

At the trial, the government did not dispute agent Rowan's testimony that he was sent to Smith by the Bureau

of Narcotics in January, 1960, for the purpose of "building a [new] case". Agent Rowan testified, without contradiction by his superiors who also testified, that he was authorized by the Bureau to offer Smith $5,000 "if he would testify against some defendants" in this case. Rowan explained to Smith that the government offer was "entirely" unrelated to previous services rendered by Smith in Canada. (App. 24a).

Rowan's uncontradicted testimony that Smith was promised, and later given, additional money by three narcotics agents when Smith at first refused to appear before the Grand Jury and that, in addition, Smith was promised other things of value for his testimony, is more fully related in the Petition. (App. 24a-25a)

Smith himself conceded on cross-examination that the money which he was getting from the government was one of the "prime considerations" which induced him to testify and that he understood, at the first trial, that his testimony could bring a "reward". (App. 25-26a)

Despite the government's suggestion that "other evidence in the record" disproves that Smith was paid large sums of money to give testimony in 1960 and 1961 (G. Br. 11), the only references in its brief to "undercover" work engaged in by Smith are to his activities prior to September 1959. (G. Br. 12, 14) The only "evidence" which the government employs to support its theory that Smith earned the "per diem" after he made impossible his continued service in an undercover capacity by giving testimony against certain Canadians named in this indictment, is a Bureau of Narcotics voucher which is disingenuous on its face, and, at most, covers only a small portion of the sums received by Smith. (G. Br. 13)

The voucher, receipted by Smith, was submitted to the Bureau by an agent who had paid Smith $1,500 prior to his first grand jury appearance in February 1960. (Pet. 6, App. 25a; G. Br. 43) The agent had obtained the $1,500

for "travel and other expenses". (F. Tr. 5203-04) The voucher submitted in support of the expenditure stated that the sum represented a "per diem" paid to Smith for "150 days" from the middle of September 1959 through the end of January, 1960—the period during which he could have done no work in an under-cover capacity. There is no suggestion that he rendered any other services during that period. It was payment for grand-jury testimony and could not have been anything else.

At the trial, further exploration of the nature of Smith's "services" was cut off when the Court sustained the prosecutor's objection based upon irrelevancy. (5206-08) Petitioner's attorney explained:

> "Your Honor, I am trying to establish, and I have a right to establish, that this man [Smith] wasn't working for the Bureau during this time, and if he wasn't working for them he had no right to $300 a month." (F. Tr. 5206)

He was answered by the Court as follows:

> "The Court: I am not going to allow questions as to what services Smith rendered . . . Now, further more, this question would be objectionable for other reasons." (F. Tr. 5207)

The evidence of Rowan that Smith was offered and paid large amounts of money to give testimony, and Smith's evidence that the money paid him was a prime consideration for his giving testimony, is uncontradicted.

The section on which the government relies, 31 U. S. C. 529a (G. Br. 14), furnishes no warrant for its payments for Smith's testimony, and the government makes no attempt to take the payments outside the prohibitions of 31 U. S. C. 529.

(5) Significantly, the government does not dispute the appropriateness of the reasons urged by petitioner for the granting of rehearing. Nor does it dispute the very serious

reflection on the fair administration of justice necessarily cast by the record. Rather, it attempts to raise issues of fact where, as has been demonstrated, there are none, and treats the points raised in a manner which, if appropriate at all, is appropriate to argument on the merits.

Respectfully submitted,

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